FILED
JUL 25 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-14

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
versus
LEOLA STUDDERT GISSEL, Executrix of the Estate of JULIUS SCHUTZE GISSEL, and GLOBE INDEMNITY COMPANY,
Defendants-Appellants,

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
versus
C. J. THIBODEAUX and COMPANY and THE TRAVELERS INDEMNITY COMPANY,
Defendants-Appellants.

(Consolidated Cases)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EASTHAM, WATSON, DALE & FORNEY,
of Counsel

ALAN S. DALE
Mellie Esperson Building
Houston, Texas 77002
Counsel for Petitioners, Leola Studdert Gissel, Executrix of the Estate of Julius Schutze Gissel and Globe Indemnity Company
and
ROBERT M. JULIAN
1314 Texas Avenue
Houston, Texas 77002
Counsel for Petitioners, C. J. Thibodeaux and Company and Travelers Indemnity Company

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

TABLE OF CONTENTS

	Page
AUTHORITIES CITED	i
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	4
REASONS FOR GRANTING WRIT	6
CONCLUSION	26
APPENDIX:	
1. Decision of District Court	29
2. Decision of Court of Appeals	56
3. Page One of Vessel, Vehicle or Aircraft Bond (Term), Customs Form 7569, Executed by Petitioner	61
4. Application By Petitioner To Bureau of Customs For A Permit To Lade or Unlade Vessels, etc.	62
5. Entry Made By The Master of The SS Sea Pioneer of Cost of Repairs Made to Vessel in Foreign Ports, Custom Form 7535	63

AUTHORITIES CITED

CASES

	Page
Bemis Bro. Bag Co. v. United States, 59 Treas. Dec. 169, T.D. 44558 (1931)	12
Caldwell Shipping Co. v. United States, 53 Cust. Ct. 311 (1964)	2, 11, 12, 13, 14
Yee Chong Lung & Co. et al. v. United States, 11 Ct. Cust. Appls. 382, T.D. 39191 (1922)	12

STATUTES

19 U.S.C. 66	7, 8, 9
19 U.S.C. 257	3, 4, 7, 8, 10, 18, 23, 24, 25, 26
19 U.S.C. 1435	21
19 U.S.C. 1484	9, 10
19 U.S.C. 1485	9
19 U.S.C. 1498	8, 9, 10
19 U.S.C. 1623	8, 10, 11
19 U.S.C. 1624	8

Page

REGULATIONS

19 C.F.R. 4.14 ..... 5, 9, 15, 16, 24, 25, 26
19 C.F.R. 4.16 ..... 21, 25
19 C.F.R. 4.7 25

CUSTOMS FORMS

Customs Form 3171 ..... 4, 12, 18, 25, 26
Customs Form 3415 25
Customs Form 7567 ..... 17, 18, 20
Customs Form 7569 ..... 10, 11, 15, 16, 17, 18, 19, 20, 21, 22, 23

MISCELLANEOUS

28 F.R. 14546 (1963) 9
3 C.J.S. "Agency" § 197 (1973) 12
4 Cust. Bull. 783, T.D. 70-254(2) (1970) 13, 23
T.D. 45092 (1931) 17, 18, 22

IN THE

Supreme Court of the United States

October Term, 1974

NO._____

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
versus
LEOLA STUDDERT GISSEL, Executrix of the Estate of JULIUS SCHUTZE GISSEL, and GLOBE INDEMNITY COMPANY,
Defendants-Appellants,

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
versus
C. J. THIBODEAUX and COMPANY and THE TRAVELERS INDEMNITY COMPANY,
Defendants-Appellants.

(Consolidated Cases)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Leola Studdert Gissel, Executrix of the Estate of Julius Schutze Gissel, and C. J. Thibodeaux and Company and their sureties pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on April 26, 1974 (Court of Appeals Opinion, *infra*, p. 56).

OPINIONS BELOW

The opinion of the Court of Appeals is included in the Appendix beginning at page 56. The opinion of the United States District Court for the Southern District of Texas is reported at 353 F. Supp. 768 and is included in the Appendix at page 29.

JURISDICTION

The judgment of the Court of Appeals was entered on April 26, 1974. The jurisdiction of this Court rests on 28 *U.S.C.* § 1254(1) (1966).

QUESTIONS PRESENTED

1. Whether the procedures and forms employed by the Bureau of Customs with regard to the liability of a ship's agents' blanket term bond, Customs Form 7569, comply with the language and intent of the statutes and are in accord with the legislative concept of foreign repair duties under 19 *U.S.C.* § 257 (1965)?

2. Whether the District Court erred in relying on *Caldwell Shipping Co. v. United States,* 53 Cust. Ct. 311 (1964) and Treasury Division 70-254(2) (1970)?

3. Whether the District Court and the Court of Appeals erred in holding that the language of the customs forms and the regulations clearly and unequivocally made defendants liable on their bonds?

4. Whether the ambiguity and lack of specific procedures in the area of foreign repair duties require that the Bureau of Customs be barred from holding defendants liable?

5. Whether the Collector of Custom's granting clearance for a vessel to depart port without payment of debts and his failure to obtain a bond for such debts, as required by law, act as a waiver of whatever rights, if any, the collector may have had against the vessel's agents?

STATUTES INVOLVED

The relevant provisions of 19 *U.S.C.* § 257 (1965) (presently 19 *U.S.C.* § 1466) (1974 Supp.)

> (a) The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country; and if the owner or master of such vessel shall willfully and knowingly neglect or fail to report, make entry, and pay duties as herein required, such vessel, with her tackle, apparel, and furniture, shall be seized and forfeited. For the purposes of this section, compensation paid to members of the regular crew of such vessel in connection with the installation of any such equipments or any part thereof, or the making of repairs, in a foreign country, shall not be included in the cost of such equipment or part thereof, or of such repairs.

STATEMENT OF THE CASE

The United States of America filed actions in the District Court for the Southern District of Texas, Houston Division, to recover the penal amount of $10,000.00 al-

ledgedly due on each of two bonds posted by local agents of the SS SEA PIONEER. The Bureau of Customs contended that the agents' bonds cover the failure of the Master and Owner of the SS SEA PIONEER to pay duty owed pursuant to 19 *U.S.C.* 257 on the cost of repairs to an American vessel which were made in foreign ports.

The defendants denied that their bonds covered duty owed by the shipowner for those repairs and alternatively, contended that by its conduct the Government had waived any right which it might otherwise have had to recover said duties from the agents and/or sureties.

The cases were consolidated and submitted to the Court for a decision on stipulated facts.

Thereafter, the District Court, Hon. Carl O. Bue, Jr., U.S.D.J., filed its Memorandum Opinion on January 19, 1973, holding defendants liable for the penal amount of their bonds, and judgment was entered against said defendants on May 24, 1973.

STATEMENT OF FACTS

Repairs were made to the SS SEA PIONEER while on foreign voyages and prior to her arrival at Port Arthur, Texas (where Gissel acted as agent) on May 27, 1964 and prior to her arrival at Galveston, Texas (where Thibodeaux acted as agent), in respect of which duties would be payable pursuant to 19 *U.S.C.* 251.

In anticipation of the SS SEA PIONEER's arrival at Port Arthur and Galveston, each agent filed an application with the Bureau of Customs, on Customs Form 3171, for the vessel to enter port and for such operations as are described in the applications, copy of which is included in the Appendix at p. 62.

The first line of the applications reads:

> "Application is hereby made for a permit, for some or all of the operations described below and for overtime services if indicated in Item 9, in connection with the AMER. SS 'SEA PIONEER' of the Pioneer Tanker, Inc. Line to lade or unlade, * * *."

After the SS SEA PIONEER's arrivals in the ports of Port Arthur and Galveston, the Master filed Customs Form 7535, "Entry of Equipment and/or Repair Parts or Repairs Made in Foreign Countries Upon American Vessels", with the Collector of Customs at each port.

The SS SEA PIONEER was granted clearance and departed both ports even though duty was not paid and no bond was given by the shipowner, as required by 19 *C.F.R.* 4.14(b), covering duty payable on the cost of foreign repairs to the vessel. The duties payable were eventually liquidated on November 28, 1967 in the GISSEL case in the amount of $14,216.96 and on March 26, 1968 in the Thibodeaux case, in the amount of $57,674.26 (*infra*, p. 32).

Pioneer Tankers, Inc. became insolvent, the SS SEA PIONEER was seized in Singapore and on April 29, 1969, the court in Singapore disallowed a claim which was asserted therein on behalf of the Bureau of Customs against the proceeds from the sale of the vessel. Thereafter, for the first time, the Bureau of Customs claimed that agents could be called upon to respond up to the $10,000.00 principal amount of each of the blanket bonds they had posted in connection with their own activities as local ship agents.

REASONS FOR GRANTING THE WRIT

The decision strikes at the very heart of the ship agency business. It will affect literally thousands of agents throughout the continental United States, Alaska, Hawaii and Puerto Rico, each of which is required by law to post a term bond every year. Some of the agents have posted bonds for scores of years. For over a hundred years the Government had never proceeded against an agent to collect duty owed by a shipowner on the costs of repairs made in foreign ports and the decision represents a radical departure from accepted custom.

It is manifestly unjust to expose ship agents to multiple recoveries of $10,000 each, plus interest, to recover debts which are by statute for the account of shipowners and for matters over which the agents have no knowledge or control.

This is a case of first impression in the Supreme Court of the United States and is of such substantial importance to many small businesses throughout the country, who are paid a purely nominal fee of $250, and so many bonds are presently outstanding, that this court should grant a *writ of certiorari.*

The question presented by the parties in this case is succinctly stated by the opinion of the Court of Appeals for the Fifth Circuit, wherein the court observed:

> In a nutshell, it is defendants' position that their bond covers only obligations for routine services rendered while the vessel was in port, and which they specifically requisitioned by executing Customs Form 3171, while the government claims that it covers the whole spectrum of the vessel's liability.

Infra, p. 58.

Central to the proper resolution of these conflicting contentions is the interpretation of the various statutes, regulations and customs forms governing this area of customs law as they relate to the liability of Gissel and Thibodeaux, the local agents for the SS SEA PIONEER, for the failure of that vessel's owner or master to pay duty on the cost of repairs made to the SS SEA PIONEER in foreign ports.

The principal statute involved is 19 *U.S.C.* § 257 (1965) (presently 19 *U.S.C.* § 1466 (1974 Supp.):

> (a) The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country; and if the owner or master of such vessel shall willfully and knowingly neglect or fail to report, make entry, and pay duties as herein required, such vessel, with her tackle, apparel, and furniture, shall be seized and forfeited.

In order to accomplish the purpose of 19 *U.S.C.* § 257 and the other sections of the Tariff Act of 1930, a number of other statutes were enacted to enable the Secretary of the Treasury to prescribe rules and regulations. Among the pertinent sections relied on by the District Court (*infra*, pp. 37, 38), and the Court of Appeals (*infra*, p. 59), in upholding the validity of these regulations, are 19

U.S.C. § 66 (1974 Supp.), 19 *U.S.C.* § 1623 (1974 Supp.) and 19 *U.S.C.* § 1624 (1965).

While these statutes provide ample authority for the promulgation of rules and regulations, they are general in language and broad in their grant of power. This is especially exemplified by 19 *U.S.C.* § 1624 (1965):

> In addition to the specific powers conferred by this chapter the Secretary of the Treasury is authorized to make such rules and regulations as may be necessary to carry out the provisions of this chapter.

The chapter referred to above is Chapter 497, Title IV of the Tariff Act of 1930, which chapter also included 19 *U.S.C.* § 1623(b)(3) (1974 Supp.) under which the Secretary of the Treasury may:

> (b)(3) authorize the execution of a term bond the conditions of which shall extend to and cover *similar cases* of corporations. . . . [Emphasis added].

Both courts failed to consider 19 *U.S.C.* § 1498 (1974 Supp.) which preceded the above cited sections in the original Chapter 497, and specifically referred to 19 *U.S.C.* § 257 (1965), the foreign repairs duties statute:

> (a) The Secretary of the Treasury is authorized to prescribe rules and regulations for the declaration and entry of—
>
> . . . .
>
> (9) Merchandise within the provisions of sections 257 . . . of this title (relating to supplies, repairs, and equipment. . .) at the first port of arrival.

> (b) The Secretary of the Treasury is authorized to include in such rules or regulations any of the provisions of section 1484 or 1485 of this title (relating, respectively, to entry and to declaration of merchandise generally).

This explicit reference is likewise present in the regulations, in that while the general authorities relied on to enable the Secretary of the Treasury to promulgate 19 *C.F.R.* § 4 (1973) were 19 *U.S.C.* § 66 (1974 Supp.), and 19 *U.S.C.* § 1924 (1965), it was clearly stated in the headnote that "additional authority is cited in the parenthesis following the sections affected." 28 *F.R.* 14546, Dec. 31, 1963. At the end of 19 *C.F.R.* 4.14 (1973), the regulation specifically relating to foreign repair duties, 19 *U.S.C.* § 1498 (1974 Supp.) is the only specific authority cited as a basis for that regulation. Thus, it is clear that the author of the regulations was aware of 19 *U.S.C.* § 1498 and the reference in that statute to 19 *U.S.C.* §§ 1484, 1485 and that 19 *U.S.C.* § 1498 was specifically relied on in promulgating 19 *C.F.R.* 4.14.

This explicit reference to the foreign repairs statute and the specific direction to and approval of the requirements of the general provisions relating to entry and to the declaration of merchandise, 19 *U.S.C.* §§ 1484, 1485, illustrate the proper utilization of the various bonds at the disposal of the local collector of customs. As is demonstrated by 19 *U.S.C.* § 1484(c)(2), when for one reason or another there is a failure to produce documents such as a bill of lading, the appropriate customs officer may "release the merchandise from customs custody if the person making such entry gives a bond satisfactory to such customs officer in a sum of equal to not less than

one and one-half times the invoice value." (Emphasis added). This particular bond relates to a specific situation, *i.e.*, the production of documents, which is covered under the headnote to the term bond, Customs Form 7569 (*infra*, p. 61), the specific bond in question here.

While the interplay of these various sections is complicated and somewhat unclear, two things seem evident. First, despite the explicit reference in the headnote of Customs Form 7569 that the bond is to be used to require the production of documents, 19 *U.S.C.* § 1484 (c)(2) contemplates the issuance of a separate bond executed at the time of entry in an amount equal to one and one-half times the invoice value of the merchandise to be released from customs custody. This all takes place at the time of entry, and 19 *U.S.C.* § 1498(b), *supra*, specifically approves of similar treatment for repair duties under 19 *U.S.C.* § 257. This seems to be a clear indication of a legislative intent that foreign repair duties be given the same individual treatment because of their unique nature, and this argument is supported by the unique nature of the other ten situations listed in 19 *U.S.C.* § 1498(a), which include, *inter alia*, salvage, goods damaged by fire or marine casualty, personal effects of United States citizens who have died overseas, and tools of trade of a person arriving in the United States.

Second, the statute delegating to the Secretary of the Treasury the authority to issue term bonds requires that the term bonds "shall extend to and cover *similar cases* of importation." 19 *U.S.C.* § 1623(b)(3) (1974 Supp.) (emphasis added). The use of the words *similar cases* can only refer to the ordinary and necessary expenditures incurred in providing the services required of a ship's

agent, and not the extraordinary costs of unknown and unbargained for foreign repair duties.

Despite the clear indications of the intent of the legislature that foreign repair duties be treated as individual cases and that bonds be issued to fit the particular situation, the Bureau of Customs contends that one blanket term bond in the amount of $10,000 was intended to cover not just one particular entry of a vessel but all of the repair duties incurred by all of the vessels serviced by the agent during the one year term the bond was in existence. It is submitted that such a contention is illogical and lacking in sound business judgment. The final liquidations in the present cases exceeded $57,000 and $14,000 respectively, while the term bonds on Customs Form 7569 was for only $10,000 each. Additionally, the statute authorizing the issuance of bonds, 19 *U.S.C.* §1623 (b)(3), contemplates the use of bonds for "similar cases" of importation, and as has been demonstrated above, the legislature clearly demonstrated its consideration of foreign repair duties as unique. Simply stated, the procedures and forms used here comply with neither the language nor the intent of the statutes.

II

While admitting that "there is only a paucity of authority in this legal area and no proof in this record of any custom or practice which firmly supports the theory that a local agent should be liable for such repairs under its blanket bond" (*infra*, p. 35), the District Court relied heavily on *Caldwell Shipping Co. v. United States*, 53 Cust. Ct. 311 (1964).

In that case, the agent paid duty amounting to $1,400.00 and thereafter sought a remission from the Bureau of

Customs. No evidence was taken in the case and the facts do not disclose the capacity in which the agent acted or what items were checked in the agent's application on Customs Form 3171, "Application and Permit to Lade and Unlade Vessels. . . ." Furthermore, the vessel was still in port and, unlike this case, the vessel was not granted clearance prior to the payment of duty. The holding of the Customs Court in *Caldwell* was an extremely narrow one:

> *The statute does not require an agent to pay the duties on repairs;* but if the owner or the master employs an agent, and the agent does pay the duties, his action, like other actions of an agent, is the action of the principal if it is within the scope of the agent's authority. *Yee Chong Lung & Co. et al. v. United States,* 11 Ct. Cust. Appls. 382, T.D. 39191; *Bemis Bro. Bag Co. v. United States,* 59 Treas. Dec. 169, T.D. 44558.

Id. at 313 (emphasis added).

As is demonstrated by the above quote, the Customs Court expressly held that the statute does not require an agent to pay duties on repairs, and relied on the voluntary payment by the agent. The court continued:

> Although the authority of the agent here has not been delineated precisely, and we lack proofs, to represent the ship's operator at the port of entry often involves the expenditure of money; therefore, a request on the part of the principal to incur expenditure may be inferred, together with an implied promise to repay. 3 *Corpus Juris Secundum* "Agency," section 197.
>
> Under the circumstances, the Government would have a right to rely on plaintiff's implied or ap-

> parent authority to pay the duty assessed and which plaintiff did, in fact, pay.

Id. at 313.

The District Court ignored the actual holding of *Caldwell Shipping Co.*, relying instead on a paragraph discussing the question of forfeiture for failure of owner or master to make entry and pay duties. Using tentative language and alternate arguments, the Customs Court denied the propriety of the seizing and forfeiture of the vessel in question "since the master did in fact make an entry, although an incomplete one, and the duties were covered, first, by the bond of the agent and, later, by payment of duties by that agent." *Caldwell Shipping Co.* at 313 (*infra*, p. 42). Accordingly, *Caldwell Shipping Co* is, at best, dicta to the extent relied on by the District Court and contains equally explicit language denying the liability of an agent for foreign repair duties. It is submitted that neither the holding of *Caldwell Shipping Co.* nor the opinion itself requires or demonstrates any in-depth examination of the question in the present case or the pertinent statutes, regulations and customs forms, and thus should not be relied on as authority in this case. The questions raised in this litigation were not present in the *Caldwell* case.

The District Court also relied on a 1970 decision of the Department of the Treasury wherein it was specifically indicated that an agent's bond was liable for duties for foreign vessel repairs (*infra*, p. 42). 4 Cust. Bulletin 783, T.D. 70-254(2) 1970).

The District Court noted:

> ". . . that interpretations and opinions of an administrative agency 'constitute a body of experienced

> and informed judgment to which courts and litigants may properly resort for guidance.' "

That statement is undoubtedly true in respect of technical data and operational expertise, but it has no application in this instance where the sole issue is a question of law.

Furthermore, the Bureau of Customs' administrative decision was made in 1970 and, therefore, was not in existence at the time the bonds were posted in 1964. The Bureau of Customs' administrative decision appears to have been an after-thought promulgated by the Bureau after having permitted the SS SEA PIONEER to depart Port Arthur and Galveston without posting bonds sufficient to cover at least $14,000.00 and $57,000.00 in duties, respectively, and after Pioneer Tankers, Inc. had become insolvent. The propriety of this "after-thought" is questionable in light of the intention of the statutes, as was discussed above, the timing of the decision, and the ambiguities of the various forms and regulations, to be discussed below.

III

The District Court's third point in finding defendants liable on their bonds is the "clear and unequivocal" language in the regulations and forms promulgated by the Secretary of the Treasury. (*Infra*, pp. 44, 45). It was upon this point that the Court of Appeals for the Fifth Circuit seized in affirming the District Court, completely omitting any reference to the Treasury Bulletin discussed above, and utilizing *Caldwell Shipping Co.* only as support for a general statement that it is proper for an agent to

furnish credit as a service to his principal. (*Infra*, p. 3027).

The Court of Appeals based its opinion on the "breadth of the language" in Customs Form 7569, and on 19 *C.F.R.* § 4.14 (1973), which refers specifically to foreign repair duties and to Customs Form 7569 as being suitable for covering these duties. (*Infra*, p. 59).

It is petitioners' contention that a careful reading of these authorities reflects a "clear and unequivocal" intent that a ship's agent *not* be held liable for foreign repair duties on a blanket term bond such as Customs Form 7569, and that, at the very least, the ambiguity of the various regulations and forms, the lack of any previous cases on point, the disruptive effect on the ship's agent's trade, and the failure of customs officials to follow their own prescribed procedures, require a resolution of this case in their favor.

The instrument under which the Bureau of Customs claims that Gissel & Thibodeaux are liable on the cost of repairs made to the SS SEA PIONEER is on their blanket term bonds on Customs Form 7569 (*infra*, p. 61). The relevant paragraph of this Customs Form states:

> NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH THAT—
>
> (1) If the above-bounden principal shall pay to the collector of customs of said port(s) promptly on demand such penalties as may be incurred by the vessels, vehicles, or aircraft, together with the sums chargeable under law and regulations for such services as may be performed for said vessels, vehicles, or aircraft by customs officers or employees, and

> shall promptly pay any duties, charges, exactions, penalties, or other sums found legally due the United States from any master or other proper officer or owner of said vessels, vehicles, or aircraft on account of said vessels, vehicles, or aircraft;
>
> . . . .
>
> Then this obligation shall be void; otherwise to remain in full force and effect.

It is from this general language which, in effect, makes the ship's agent liable for anything and everything that is done "by," "for," or "on account of" the ship or master, that the courts below base their finding that Gissel and Thibodeaux are liable for foreign repair duties. This reliance is supplemented in the Court of Appeals decision by reference to 19 *C.F.R.* § 4.14 (1973) (*infra*, p. 59), which specifically refers to Customs Form 7569 as being suitable for foreign repair duties.

The key sentence in 19 *C.F.R.* § 4.14(b) states:

> Estimated duties shall be deposited or a bond on Customs Form 7567 or 7569 given therefor before the vessel shall be allowed clearance, . . .

Applying a casual analysis to the above authorities, it is easy to conclude that since 19 *C.F.R.* 4.14(b) expressly approves Customs Form 7569 for foreign repair duties, and since the form itself is so broadly worded as to encompass all types of liability, that a ship's agent who signs such a bond is liable for these duties. This conclusion is rebutted by a number of related authorities, the most obvious being that 19 *C.F.R.* § 4.14 clearly states that the bond *shall* be given for a presently incurred liability, namely "estimated duties" and that this shall

be given before clearance will be allowed. This ambiguity requires further analysis.

Initially, it must be pointed out that no mention of liability for foreign repair duties is made in Customs Form 7569. In order to ascertain the scope of Customs Form 7569, it is necessary to trace the form through its various revisions until 1931, at which time the Commissioner of Customs revised the form in order to bring it into compliance with the Tariff Act of 1930. T.D. 45092 (1931). In his prefatory comment, the Commissioner noted that "preceding each form will be found a description of the bond, its use, and the amount of penalty prescribed." T.D. 45092, p. 307 (1931), Customs Form 7569 states:

> This bond is similar in its provisions to the single entry vessel aircraft bond (Form 7567) and covers all entrances, clearances, etc., ...
>
> The penalty on this bond shall be not less than 10,000 and shall be fixed by collectors in such larger amounts as may be determined to afford ample security.

From the above quote, it is evident that one aim of the bond was to protect the revenue of the United States by requiring ample security. How such an aim could be obtained by the use of a blanket term bond in the amount of $10,000 for foreign repairs which were unknown to either the ship's agent or the local collector of customs is not explained. Nevertheless, Customs Form 7569 is termed "similar in its provisions to the single entry vessel aircraft bond (Form 7567)," and this bond is made specifically applicable to foreign repair duties;

> This bond covers lading or unlading at night, or on Sundays or holidays; the landing of equipment . . ., the discharge of cargo . . .; the payment of all legal charges and penalties that may be incurred, including duties found under section 466 [19 *U.S.C.* § 257 here], Tariff Act of 1930;

T. D. 45092, p. 327 (1931).

From the above it is easy to argue that since 7569 is similar to 7567, and since 7567 includes foreign repair duties, 7569 must do so also. And so it might, had it been given for that purpose or expressly made liable for such duties by Customs Form 3171 (*infra*, p. 62), which relates to petitioner's "Application and Permit to Lade or Unlade Vessels of 5 Net Tons or More and to Allow Unentered Cargo to Remain Upon Wharf Beyond a Five Day Period." The fact is that this bond was not given for such a purpose. Rather, the bond was given to facilitate and expedite the normal and usual undertakings connected with entering and clearing port. This is indicated by the specific reference in Customs Form 3171 to the term bond, and also by the fact that 3171 has nine explicit references to services to be rendered in port, and not one of them obligates the bond for foreign repair duties. There are also three blanks which might have been used to undertake such a liability, but these were not filled in.

The layout or physical makeup of Form 3171 is such as to indicate that the nine separately numbered and printed items closely parallel the headnote of the bond itself (Form 7569), which reads "(to lade or unlade at night or on a Sunday or a holiday, to land equipment for repairs, etc., to discharge on lighters or outside docks,

to pay legal charges, penalties, etc., to land cargo in other districts or foreign ports, to secure the payment of overtime and to produce documents)." None of those items refer to duty on foreign made repairs.

The only document which refers to the duty payable on the cost of repairs made in foreign ports is Customs Form 7535 (*infra*, p. 63). The last line of the first paragraph reads as follows:

> "I hereby stipulate that the estimated duties will be deposited, or bond given therefore, before clearance is granted, except on vessels specifically exempted by regulations of the Secretary of the Treasury, and that all increased duties that may accrue will be paid when ascertained."

This stipulation must be made by the master or owner. There is no mention of an agent. Additionally, in the *Thibodeaux* case, the Master of the SS SEA PIONEER declared in a typewritten insertion on that form that:

> "THIS IS AN ESTIMATED PRELIMINARY ENTRY. FINAL & CORRECT ENTRY WILL BE MADE BY MY OWNERS. PIONEER TANKERS, INC., 200 PARK AVE., NEW YORK, N.Y., AS SOON AS ALL FINALIZED INVOICES ARE IN HAND."

No references whatsoever is made to C. J. Thibodeaux and Company or to Thibodeaux's bond. The obligation is placed squarely on the owner or master of the ship.

While it is possible to hold petitioners liable on the theory that had they examined the 1931 Treasury Decision regarding 7569, they might have been examined

7567 and been put on notice of this liability, the better and far more equitable view is that Customs Form 7569 was never intended to include this aspect of the scope of Customs Form 7567 unless expressly assumed by an agent. This view is supported by a number of authorities. First of all, the foreign repairs duty statute is directed at shipowners and masters, and, despite being a revenue collecting statute, its primary thrust is to deter the shipowner or master from utilizing foreign ports and foreign labor to effect repairs, a subject over which the agent has no authority. (*See* District Court Opinion, *infra*, p. 36). In essence, the statute protects American shipyards by placing a fifty percent ad valorem duty on foreign repairs.

When this duty is shifted to the ship's agent, the deterrent effect of this statute is eliminated. When it is shifted to the ship's agent's bond in an amount which bears no relationship to the actual cost of repairs, the revenue aspect of this statute is severely curtailed. (The SS SEA PIONEER was liable for approximately $57,000 in the Thibodeaux case, while the agent's bond was only $10,000). It seems clear that the protection and production of revenue, and the clearly pronounced intention to deter the use of foreign shipyards (*infra*, p. 36), indicate that a more flexible and adaptable means be employed to secure these goals than a blanket term bond in the amount of $10,000, and such a means was provided, although in the complexity of promulgating regulations and operating the customs service, such a procedure seems to have been shunted aside. As has been stated, Customs Form 7567 clearly is intended for vessel repairs made in foreign countries. This form is a single entry

form issued in the same manner as Customs Form 7569 and used for the same purposes, with the exception that a new one must be filed to accommodate each new ship. It is at once obvious that such a form is ideally suited for the proper resolution of situations similar to the case at bar. These individual forms are issued for each ship and can be tailored to fit the existing circumstances and liabilities. They protect the revenue and can be required of the shipowner, the master, or an agent if such parties wish to undertake the liability. If liability for foreign repair duties is not accepted by one of these parties, the ship can be refused clearance and all parties will be protected from similar occurrences of overseas seizure and sale. Indeed, such a procedure commends itself to common business judgment and financial responsibility, while the procedures used here demonstrate a lax attitude toward knowledgable assumption of known risks and liabilities, and preclude reasonable financial planning in the assumption of such liabilities. It thus seems entirely reasonable to conclude that Customs Form 7569 was never intended to be used in a situation such as presented in the case at bar. If 7569 was to be used at all, it was to be issued at the time of entry or in situations similar to those described in 19 *U.S.C.* 1435(b) (1970), concerning the expeditious dispatch of vessels carrying passengers, as demonstrated by 19 *C.F.R.* § 4.16 (1973). That Customs Form 7569 was never intended for such use is explicitly stated in the "General Provisions" which followed the first publication and explanation of the Customs Forms:

> When a single entry or vessel transaction filed during the period covered by a term bond exceeds

> one-half the penalty named in the term bond, such entry or transaction *must not be charged against the term bond.* In such cases a *single entry or vessel bond must be taken,* thus avoiding the necessity for term bonds with excessive amount of penalties, and at the same time affording ample protection to the government.

T.D. 45092, p. 340 (1931) (emphasis added).

This "clear and unequivocal" language demonstrates that the customs collectors erred in failing to follow their own established procedures, and that this laxity resulted in the ultimate necessity of attempting to hold petitioners liable for the debts of the SS SEA PIONEER.

This laxity, as well as the "informal manner in which the customs agents and shipowners have handled matters relating to duties on foreign repairs" (*infra,* p. 46), is viewed by the District Court as a "procedural accommodation to the shipowner and master of the vessel." (*Infra,* p. 46). This accommodation, however, results in an unbargained for and unknown liability attaching to the ship's agent, contrary to the scheme of the legislation, the rules, the Customs Forms, and especially the general provisions above cited which specifically require that the bonds afford ample protection, avoid excessive penalties, and require the use of single entry vessel bonds such as Customs Form 7569.

IV

The ambiguity and lack of specific procedures in the area of foreign duty repairs is likewise a sufficient ground for relieving petitioners of liability. It is submitted that

petitioners' interpretation of the various authorities represents a more correct view of the liabilities and equity involved here, and, at the very least, demonstrates the confusion which has led to the present controversy.

Much of this confusion can be traced to the original wording of the statute concerning foreign repair duties. 19 *U.S.C.* 257.

> This section clearly expresses a legislative intention that liability for repair duties accrue, be ascertained and paid upon arrival . . . at the first American port of entry. This intention of prompt payment, while ostensibly achievable in practice at the time . . ., would appear to be somewhat less practical now. . . .

(District Court Opinion, *infra*, p. 37).

From this initial practice of prompt payment, and the use of the present tense "shall" to signify this prompt payment, it is reasonable to assume that regulations and customs forms relating to this statute will be consistent with the practice of prompt payment and the immediacy signified by the use of the word "shall," or such inconsistencies would be clearly demarcated. Thus, the present problem may well stem from the continuous use of the word "shall" and the continuous use of language which indicates the giving of bonds or the doing of some act at the time of entry, rather than simply stating that Customs Form 7569 shall be deemed to cover foreign repair duties. (As was finally done in T.D. 70-254(2) (1970). The present tense language of the original statute was retained and incorporated in the regulations and forms, and can be interpreted without abusing the language to require

immediate payment of foreign repair duties. Petitioners relied on this language, and also on the absence of any attempt to impose such liability during the one hundred years this foreign repairs duty statute was in effect. Indeed, since the original procedures called for prompt payment by the master or shipowner, (see District Court Opinion, *infra*, p. 37), it seems reasonable to assume that in its original form, 19 *U.S.C.* § 257 did not contemplate the undertaking by anyone else of this liability. No mention is made in 19 *U.S.C.* § 257 of an agent, nor is there reference to any bond.

It is obvious that in the process of issuing first the statute, then the forms, and finally the regulations, the guidelines have become confused and ambiguous. Typical of the continued use of confusing language which fails to indicate to a ship's agent that his existing term bond, which is essential to the efficient conduct of his business, is potentially liable for foreign repair duties, is 19 *C.F.R.* § 4.14, the specific regulation involved here:

> (a) The master's declaration on Customs Form 3415 required by § 4.7(d)
>
> (1), covering equipment, repair parts, or material acquired, or expense for repairs incurred, in a foreign country, within the purview of section 466, Tariff Act of 1930, as amended, shall be filed, whether or not the items, or any of them, may be exempt from entry as stated in paragraph (b)(1) of this section.
>
> (b) Entry on customs Form 7535 shall be made for such equipment or repairs.
>
> . . . .

> Estimated duties shall be deposited or a bond on Customs Form 7567 or 7569 given therefor before the vessel shall be allowed clearance, ...

This regulation requires the master to (1) declare on Customs Form 3415 as to any foreign repairs at the time the ship first enters an American port; (2) file an entry at this time, and deposit the estimated duties or give bond therefor; (3) file receipts reflecting the repairs if they exist. As is the case in 19 *U.S.C.* § 257, all this occurs at the time of entry, and moreover, no mention is made of any agent. It is the master who makes the declaration with regard to repairs; it is the master who makes the entry, and it is the master who files the receipts. This obligation is also stated in 19 *C.F.R.* § 4.7(d)(1), which again places full responsibility on the master to file these documents. It is interesting to note that 19 *C.F.R.* § 4.16 (1968), which was originally passed in 1963 at the same time as 19 *C.F.R.* § 4.14, expressly refers to an agent in permitting the use of a term bond. Had the author of the regulations so intended, the word "agent" could have been inserted in 19 *C.F.R.* § 4.14 in 1971 when it was last revised. 19 *C.F.R.* § 4.16 concerns passenger vessels on regular schedules and the bond in that regulation is required to secure reimbursement for overtime services and specifically requires that Customs Form 3171 be used to apply for these services. 19 *C.F.R.* § 4.14 is concerned with American ships arriving from foreign countries, and lists the steps the master must take to complete entry and gain clearance when foreign repair duties are due. It is written in the present tense, and the bonds are directly tied to the estimated duties:

> Estimated duties shall be deposited on a bond on Customs Form 7567 or 7569 given therefor before the vessel shall be allowed clearance. . . .

19 *C.F.R.* § 4.14(b).

Under this sentence the master shall deposit or give a bond for the estimated duties. This bond necessarily must be directly related to the estimated duties and clearly indicates that a new bond is contemplated. Use of any existing bond might be possible if Customs Form 3171 were to be filed expressly assuming the obligation, but it is clear that in the absence of this the whole tenor of 19 *C.F.R.* § 4.14 contemplates activity in the present.

CONCLUSION

It is submitted that petitioners' construction of the various authorities constitutes the intended interpretation of these complex and intertwined statutes, regulations, and forms, and represents a rational, workable approach to the existing situation in the shipping industry. The interpretation of the Bureau of Customs would create chaos among the numerous small firms operating as shipping agents and effect a restructuring of the financial arrangements throughout the trade.

At the very least, the failure of the customs agents to follow their own procedures, the ambiguity of the various statutes and regulations, and the absence of any relationship between the term bond and the monies due under 19 *U.S.C.* § 257 constitute such a failure on the part of the Bureau of Customs to promulgate clear and workable guidelines, and then to adhere to them, that recovery should be denied.

For the reasons stated, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ALAN S. DALE
Mellie Esperson Building
Houston, Texas 77002
Counsel for Petitioners,
Leola Studdert Gissel, Executrix of the Estate of Julius Schultz Gissel and Globe Indemnity Company

ROBERT M. JULIAN
1314 Texas Avenue
Houston, Texas 77002
Counsel for Petitioners,
C. J. Thibodeaux and Company and Travelers Indemnity Company

Of Counsel:

EASTHAM, WATSON,
DALE & FORNEY

CERTIFICATE OF SERVICE

I hereby certify that on July 23, 1974, copies of the foregoing brief were served upon all attorneys of record by mailing same in securely sealed, postage prepaid envelopes addressed to Mr. Lawrence L. Ledebur, Chief, Admiralty & Shipping Section, Department of Justice, Washington, D.C. 20530; and to Mr. Jack Shepherd, Assistant United States Attorney, P. O. Box 61129, Houston, Texas 77061.

Robert M. Julian

ROBERT M. JULIAN

APPENDIX

[226]

MEMORANDUM OPINION

(Caption Omitted)

(Filed January 19, 1973)

In these consolidated actions the United States, as obligee, seeks to recover on two $10,000 bonds which it is asserted guaranteed the payment of certain customs duties previously assessed against the vessel SS SEA PIONEER pursuant to

[227]

19 U.S.C. § 257 as a result of foreign vessel repairs. The defendants are (1) the principals on the bonds, who are also the local berth or husbanding agents for the same vessel and its owner on separate occasions, and (2) the sureties on said bonds. The parties have stipulated the facts and, therefore, the causes have been submitted for decision on briefs.

I.

THE FACTUAL BACKGROUND

The facts which lead to the instigation of these lawsuits against the local berth agents and the sureties on their bonds can be briefly summarized. The SS SEA PIONEER was a 18,000 ton merchant vessel owned and operated by Pioneer Tankers, Inc. and documented under the laws of the United States. The vessel made various trips to foreign ports and thereafter correlative first en-

tries into American ports as a merchant vessel. Two such first entries into American ports provide the setting for these lawsuits. The first occurred at Port Arthur, Texas, and the second took place approximately 18 months later at Galveston, Texas.

Prior to the Port Arthur entry defendant Collin & Gissel in its capacity as local berth agent for various vessels routinely filed on January 8, 1964, with the Collector of Customs its blanket bond entitled "Vessel, Vehicle, or Aircraft Bond (Term)" on Customs Form 7569 in the principal sum of $10,000 covering the period January 7, 1964, through January 6, 1965. This bond bound this defendant as principal to pay to the Collector of Customs various sums potentially due the United States from the master or owner of the vessels that this

[228]

defendant represented as a result of their entry into an American port. Defendant Globe Indemnity Company was surety on the bond. On May 22, 1964, defendant Collin & Gissel undertook to act as local agent in connection with the arrival, entry and clearance of the SS SEA PIONEER at the Port of Port Arthur. This defendant through a sub-agent filed with the Collector of Customs at Port Arthur a form entitled "Application and Permit to Lade or Unlade Vessels of 5 Net Tons or More and to Allow Unentered Cargo to Remain upon Wharf Beyond 5- Day Period" on Customs Form 3171 on which certain routine port operations or services were designated in connection with the soon-to-arrive vessel. Reference was made therein to the previously filed blanket bond.

The SS SEA PIONEER duly arrived at Port Arthur on May 27, 1964, inbound from a foreign voyage during which various repairs to the vessel had been made that required the payment of statutory duties. At the time of entry the master of the vessel filed an incomplete Customs Form 7535 designated "Entry of Equipment and/or Repair Parts Made in Foreign Countries upon American Vessels" reflecting that an indeterminate amount of repair duties were due. The vessel subsequently departed for another American Port without its master or owner making a deposit or posting a bond for the preliminarily estimated duties. Following various communications between Customs officials and the vessel's owner this foreign repair entry was finally liquidated on November 28, 1967, and notice of duties due in the amount of $14,216.96 was sent to the vessel's owner and defendant Collin & Gissel. However, neither payment nor

a statutory protest of the assessment, pursuant to 19 U.S.C. §§ 1514, 1515, was duly forthcoming on behalf of the owner of the local berth agent.

Prior to the Galveston entry of the SS SEA PIONEER, defendant C. J. Thibodeaux and Company (Thibodeaux) in its capacity as local berth agent for various vessels routinely filed its blanket bond entitled "Vessel, Vehicle, or Aircraft Bond (Term)" on Customs Form 7569 in the principal sum of $10,000 covering the period March 1, 1965, through February 28, 1966. Defendant Travelers Indemnity Company was surety on the bond. On October 11, 1965, defendant Thibodeaux undertook to act as local agent in connection with the arrival, entry

and clearance of the SS SEA PIONEER at the Port of Galveston. As defendant Collin & Gissel had done, defendant Thibodeaux filed Customs Form 3171 on which certain routine port operations and services were designated in connection with the soon-to-arrive vessel, and reference was made to the previously filed blanket bond. The SS SEA PIONEER duly arrived at the Port of Galveston on October 12, 1965, inbound from a foreign voyage during which repairs to the vessel had been made which required the payment of a duty. At the time of entry the master of the vessel filed an incomplete Customs Form 7535 designated "Entry of Equipment and/or Repair Parts Made in Foreign Countries upon American Vessels" reflecting that certain duties on the ship repairs were due. The vessel subsequently departed for another American port without making a deposit or posting a bond for the estimated duties. Following various communications between Customs officials and the vessel's owners this foreign

[230]

repair entry was finally liquidated on March 26, 1968, and notice of duties due in the amount of $57,674.26 was sent to the vessel's owner and defendant Thibodeaux. However, neither payment nor a statutory protest to this assessment, pursuant to 19 U.S.C. §§ 1514, 1515, was duly forthcoming on behalf of the owner or the local berth agent.

It is at this point that the facts of these lawsuits depart from what would be an ordinary and routine vessel entry and subsequent collection of custom duties from the vessel's owners. Sometime prior to May, 1968, the SS

SEA PIONEER was seized in Singapore, Malaya in connection with judicial proceedings instituted to foreclose a ship mortgage held on the vessel. The SS SEA PIONEER was subsequently sold, and the proceeds of the sale were paid into the registry of the Singapore court. At the request and expense of defendant Collin & Gissel the United States agreed that such defendant could intervene on its behalf in the Singapore proceedings to assert the claim for foreign repair duties against the proceeds of the sale on deposit in the court registry. These efforts proved to be of no avail, since on April 29, 1969, the claim was disallowed in its entirety by the Singapore court as being in the nature of an unenforceable foreign revenue and/or penal law. Turning to the only other apparent sources of possible payment of these overdue duties, the United States then made formal demand on the sureties of the bonds of the agent-defendants, Collin & Gissel and Thibodeaux. When payment was not forthcoming in due course, these lawsuits were instituted.

[231]

THE CONTENTIONS

The contentions of the various parties can be simply stated. The Government contends that the obligations assumed by the defendants in executing the blanket term bonds are express and unequivocal. It is asserted that by the terms of these bonds the defendants as local agents unconditionally promised to pay any duties or other sums found to be legally owed to the United States by the vessel owner or its master. It is the Government's position that, since these defendants chose to obligate themselves unconditionally for the payment of the foreign vessel repair

entry duties up to the $10,000 limit of their term bonds, there can be no legal defense to actions such as these to collect under the bonds.

The defendants, however, in an attempt to evade this theory of liability, simply assert that, notwithstanding the express language of the term bonds, they never promised or undertook to pay the foreign repair duties. It is their contention that the term bonds were executed only to accomodate and guarantee the payment of various nominal expenses ordinarily incurred by vessels entering and departing port and for which local berth agents are generally looked to for payment. Alternatively, in the event that they are liable on the bonds, defendants assert that the Government has waived its right to collect the duties from them both as agents and sureties since it granted continuous extensions of time to the owner of the SS SEA PIONEER to liquidate the duties due without their knowledge or consent. It is also asserted that the Government must exhaust

[232]

its remedies against the vessel and its owner prior to seeking collection from the defendants.

Restated in more practical terms, this is an issue which arises solely because the owner of the SS SEA PIONEER went bankrupt, thereby causing the Government to look around for alternative sources in order to secure payment of such duties on foreign vessel repairs. This situation has caused the Government to focus on the agents' blanket bonds which concededly have never been attacked in such fashion before, at least in the Southern District of Texas.

From the evidence submitted for consideration by this Court, it is apparent that a ruling in this case is of more than incidental significance to all parties. If the Government under these circumstances cannot go against the agent's bond, it presumably has no recourse at all to recover the duties incurred by the bankrupt shipowner as a consequence of its obtaining foreign vessel repairs on the SS SEA PIONEER. On the other hand, there is only a paucity of case authority in this legal area and no proof in this record of any procedure, custom or practice which firmly supports the theory that a local agent should be liable for such repairs under its blanket bond that routinely covers its services relative to the arrival entry and clearance of all vessels handled during the one year term of the bond. This legal dispute necessarily compels close scrutiny of the relevant statutes and regulations.

[233]

SECTION 466 OF THE TARIFF ACT OF 1930: DUTY ON EQUIPMENT OR REPAIR PARTS FOR VESSELS

A.

THE STATUTORY BACKGROUND

The Tariff Act of 1930 included within its formal title the following purpose: "An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States to protect American labor, and for other purposes." 46 Stat. 590 (1930). This statute provides for the imposition and collection of customs duties upon entry of various foreign merchan-

dise into the United States. Since foreign repair parts on vessels were generally thought of and classified as dutiable merchandise and since it was Congressional policy to encourage the obtaining of American flag vessel repairs in American shipyards, such repairs were expressly included as dutiable merchandise within a provision of the Tariff Act. The tariff law has contained such a provision in substantially the same form since the enactment of section 23 of the Tariff Act of 1866, 14 Stat. 183 (1866).

B.

THE STATUTES

The statute requiring that a duty be paid on foreign vessel repairs in effect at the times material to these lawsuits provided that:

> The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented
>
> [234]
>
> under the laws of the United States to engage in foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country; and if the owner or master of such vessel shall willfully and knowingly neglect or fail to report, make entry, and pay duties as herein required, such vessel, with her tackle, apparel, and furniture, shall be seized and forfeited. For the purposes of this section, compensation paid to mem-

> bers of the regular crew of such vessel in connection with the installation of any such equipments or any part thereof, or the making of repairs, in a foreign country, shall not be included in the cost of such equipment or part thereof, or of such repairs.

19 U.S.C. § 257.[1] This section clearly expresses a legislative intention that liability for repair duties accrue, be ascertained and paid upon arrival of the documented American flag vessel at the first American port of entry. This intention that prompt payment be made, while ostensibly achievable in practice at the time of the statute's enactment, would appear to be somewhat less practical now, since it generally takes some time for the repairs and exemptions or remissions to be ascertained by the shipowner and thereafter the duties due computed by the Customs authorities.

In order to accomplish the purpose of this section and the Tariff statute, the Secretary of the Treasury was given statutory authority to promulgate various regulations. First, he was authorized to "prescribe forms of entries, oaths, bonds and other papers." 19 U.S.C. § 66. Second, he was authorized "to make such rules and regulations as may be necessary to

carry out the provisions of this chapter." 19 U.S.C. § 1624. Third, he was authorized to "authorize the execution of a term bond the conditions of which shall extend to and cover similar cases of importations over such period of time, not to exceed one year" as he shall fix. 19 U.S.C. § 1623 (b)(3). Fourth, in situations in which bonds were not specifically required by statute, the secre-

tary was authorized to promulgate regulations to authorize collectors of customs to require bonds as deemed necessary for the protection of revenue or to assure compliance with any provision of the statute. 19 U.S.C. §1623(a).

C.

THE REGULATIONS

The basic regulation, promulgated pursuant to the enabling provisions of the statute, to accomplish the purpose of 19 U.S.C. § 257 provides that the vessel's master upon entry at the first American port shall (1) file a declaration on customs form 3415 as to any foreign repairs; (2) file an entry on customs form 7535 for such repairs; (3) file receipts reflecting the repairs, or a physical examination shall be conducted to view the repairs and verify their costs; then (4) the duties shall be estimated and a deposit made or a bond on Customs Forms 7567 or 7569 given before the vessel shall be allowed clearance; and (5) the entry shall be officially liquidated after the above stated receipts, or results of examination, are filed. 19 C.F.R. § 4.14.[2]

In accord with these regulations upon the first entry at an American port, the master or owner of the documented

[236]

vessel makes a preliminary entry indicating the repairs made in foreign countries by filing Customs Form 3415 and later declares and makes a formal entry of such repairs by filing Customs Form 7535. The declaration on the latter form provides as follows:

> I hereby stipulate that the estimated duties will be deposited, or bond given therefor, before clearance is granted, except on vessels specially exempted by regulations of the Secretary of Treasury, and that all increased duties that may accrued will be paid when ascertained.

The form of bonds acceptable to the Customs officials for this purpose are prescribed by 19 C.F.R. § 25.4. That regulation provides for 35 different bonds including the following:

> (18) Single entry vessel, vehicle, or aircraft bond, customs Form 7567, in such amount as the collector may deem necessary, but in no case less than $1,000.
>
> (19) Vessel, vehicle, or aircraft term bond, customs Form 7569, in the amount of $10,000, or such larger amount as may be fixed by the district director of customs at the port where the bond is filed. The bond, when used as a blanket bond, shall be accompanied by a copy for each port named therein.

19 C.F.R. § 25.4. The term bonds referred to under paragraph (19) above of these regulations are on Customs Form 7569 and are identical to those involved in these lawsuits. This form is entitled "Vessel, Vehicle, or Aircraft Bond (Term)," and a descriptive note to the title provides:

[237]

> To lade or unlade at night or on Sunday or a holiday, to land equipment for repairs, etc., to discharge on lighters or outside docks, to pay legal charges, penalties, etc., to land cargo in other districts or foreign ports, to secure the payment of overtime, and to produce documents.

The obligations of this agent's blanket term bond as expressed on Customs Form 7569 are specific and unequivocal:

> NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH THAT—
>
> (1) If the above-bounden principal shall pay to the collector of customs of said port(s) promptly on demand such penalties as may be incurred by the vessels, vehicles, or aircraft, together with the sums chargeable under law and regulations for such services as may be performed for said vessels, vehicles, or aircraft, by customs officers or employees, and shall promptly pay any duties, charges, exactions, penalties, or other sums found legally due the United States from any master or other proper officer or owner of said vessels, vehicles, or aircraft on account of said vessels, vehicles, or aircraft;
>
> . . . .
>
> Then this obligation shall be void; otherwise to remain in full force and effect. (Emphasis added).

The master or owner of the vessel or its local berth agent secures a permit from the Collector of Customs for certain designated operations or services at the port of entry by filing Customs Form 3171. The blanket bond is specifically referred to and obligated for any liability created as a result of the prescribed operations or services at the port. This form is entitled "Application and Permit to Lade or Unlade Vessels of 5 Net Tons or More and to Allow Unentered Cargo to

Remain upon Wharf Beyond 5-Day Period." The regulations provide that:

> A master, owner, or agent of a vessel . . . who desires that arrival may be reported, entry made, and clearance obtained on board the vessels shall file with the district director of customs an application on customs Form 3171 and a bond on customs Form 7567 in such penal sum as the district director of customs deems sufficient but not less than $1,000, or the usual term bond on customs Form 7569.

19 C.F.R. § 4.16(a). The regulations further provide that the Collector of Customs shall not issue a permit unless the merchandise is duly entered and a permit issued or a vessel bond on Customs Form 7567 or 7569 is given. 19 C.F.R. §§ 4.16, 4.30.[3]

IV.

THE ANALYSIS

With this background the Court turns to the specific issue involved in these lawsuits—the scope of liability of a local berth agent on his blanket bond. A partial resolution of this issue has been previously litigated in the United States Customs Court and decided favorably to the Government. In Caldwell Shipping Co. v. United States, 53 Cust. Ct. 311 (1964) the Customs Court concluded that a local berth agent's blanket bond which is identical to the one at issue in this lawsuit includes the obligation to pay foreign vessel repair duties. The Court's analysis and its conclusion were set forth as follows:

> At the time the vessel arrived in Jacksonville, plaintiff acted as agent of the operator of the vessel and
>
> [239]
>
> covered the vessel under its blanket bond for $10,000. (See Customs Regulations, section 4.14, providing

that entry shall be made for equipment or repairs of vessels and that estimated duties shall be deposited, or a bond on customs Form 7567 or 7569 given, before the vessel shall be allowed clearance; and section 25.4(20) providing for "Blanket vessel, vehicle, or aircraft term bond, customs Form 7569, in the amount of $10,000 * * *").

The master of the vessel filed an incomplete repair entry. Plaintiff was unable to get information necessary to complete the entry. However, plaintiff or its principal seems to have given the collector an estimate of the cost of repairs, namely, $2,800, and it is this estimate of the collector used in assessing duty. Plaintiff filed a protest and eventually, in order to avoid action on its bond, paid the duty.

The statute provides that where the owner or master willfully and knowingly neglects to make entry and pay duties on repairs made abroad, the vessel shall be seized and forfeited. Plaintiff claims that the vessel should have been seized in the instant case. However, this procedure might not have been proper, since the master did in fact make an entry, although an incomplete one; and the duties were covered, first, by the bond of the agent and, later, by payment of duties by that agent.

53 Cust. Ct. at 313. This conclusion of the Customs Court is in accord with a 1970 decision of the Department of the Treasury wherein it was specifically indicated that an agent's bond posted to cover entry of a vessel was not limited to the transactions identified on Customs Form 3171. The language of such administrative decision is particularly appropriate here:

Bond posted for vessel's entry includes obligation for duty on foreign vessel repairs. —When a vessel agent posts his Vessel, Vehicle, or Aircraft Bond,

> to cover entry of a vessel, all conditions of the bond are obligated *and obligation is* not limited to cover only those transactions identified on Customs Form 3171, Application Permit-Special License Unlading-Lading — Overtime Services, filed by the agent at the time of entry. The condition of the bond to pay any duties found legally due the United States include duty due on foreign vessel repairs under section 257, title 19, United States Code, limited to the face value of the bond.

4 Cust. Bull. 783, T.D. 70-254 (2) (1970). In this regard it should be noted that interpretations and opinions of an administrative agency "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); Estate of Charles Henry Sanford v. Commissioner, 308 U.S. 39 (1939).

Further, as the Court in Caldwell Shipping Co. inferred, the statute, 19 U.S.C. § 257, authorizes an in personam action as opposed to seizure in an in rem action to recover the foreign vessel repair duties. Accordingly, a civil action on a bond which guarantees the payment of vessel repair duties is not precluded by a failure to seize and forfeit the vessel. United States v. Cottman Co., 190 F.2d 805 (4th Cir. 1951), cert. denied, 342 U.S. 903 (1952). As in other actions for the collection of duties on other forms of merchandise, forfeiture is generally considered a penalty for failure to comply with the statutory mandates and not an initial method of collection of the duties. See The Patricia, 81 F.2d 814 (9th Cir. 1936).

In order to avoid the liability imposed by these authorities the defendants rely basically upon two contentions. First, it is contended that since the regulations, 19 C.F.R. § 4.14(b), provide that "[e]stimated duties shall be deposited or a bond on Customs Form 7567 or 7569 given" it follows that the regulations were referring to a bond filed after the duties were estimated. Therefore, it is argued, the blanket bonds, although filed on Customs Form 7569, could not be construed to be within this regulation, since they were filed months prior to the duties being estimated. Conjunctively, it is asserted that the blanket bonds are subject only to the obligations created by Customs Form 3171. Secondly, the defendants contend that to assume that these defendants would undertake cavlierly the obligation of paying foreign repair duties on any vessel for which it was only local agent would be contrary to common business judgment. In this regard, it is asserted that these local berth agents represent many vessels at various ports and that they have no knowledge of or control over the innumerable repairs performed on the vessels.

While possessing some initial surface appeal, these contentions are totally without merit. Defendants Collin & Gissel and Thibodeaux were acting as local berth agents, and in that capacity they undertook to post and posted blanket bonds which literally recite and provide for the assumption of all duties or penalties legally due the Government from any master or vessel owner which the agent has undertaken to represent at the port. Such resitations and ensuing obligations of the blanket bonds on Customs Form 7569 can only be viewed as clear

and unequivocal. To construe the language of the blanket bonds so as to include foreign repair duties merely requires the implementation of its plain meaning. The construction which the defendants urge would distort the plain meaning of the liability clause of the bonds and for no apparent reason would leave the Government without a remedy. See United States v. St. Paul-Mercury Indemnity Co., 194 F.2d 68 (3d Cir. 1952). The defendants have not contended that the language of the bonds is ambiguous, and such a contention, if urged, would be without merit since the bonds clearly "can be given a certain or definite legal meaning or interpretation." Lewis v. East Texas Finance Co., 146 S.W.2d 977, 980 (Tex. Sup. 1941). Additionally, both Customs Form 3171 and the blanket bond on Customs Form 7569 expressly refer to the entry and clearance of the vessel. See 19 C.F.R. § 4.30(b). Therefore, it does not appear unreasonable to conclude that the blanket bonds will cover obligations arising out of the entry and clearance of a vessel such as the SS SEA PIONEER. Similarly, defendants' final contention is unpersuasive. The generally recognized rule is that "courts will not construe a contract to mean that the parties agreed to act contrary to what common sense and the circumstances obviously demand, unless the contract is explicit and clear in that meaning." Stool v. J. C. Penney Co., 404 F.2d 562, 566 (5th Cir. 1968). Even if the recitations in these contracts, the blanket bonds, were contrary to common business sense, which has certainly not been proven, the subject instruments can only be viewed as explicit and clear.

The factual context in which this dispute arises points up the somewhat informal manner in which the customs agents and shipowners have handled matters relating to duties on foreign repairs performed on documented vessels. What might be initially viewed as the laxity of the customs agents in performing this governmental function can even more readily be seen as a procedural accommodation to the shipowner and the master of the vessel which is in port to discharge and load cargo in most instances on a tightly scheduled itinerary. Under such circumstances defendants as local agents for the SS SEA PIONEER and their sureties on the blanket bonds should not be permitted to extricate themselves from liability by asserting that the bond provisions do not cover such a novel contingency as exists in this case.

Unquestionably, the Secretary of the Treasury could require that a special entry bond be posted by the shipowner or its representative upon arrival in port unless a blanket bond was on file in order to protect the collection of the revenue and to assure compliance with the statute. See 19 U.S.C. §§ 66, 1623, 1624. Yet, there was no obligation, statutory or otherwise, requiring these defendants as vessel agents to assume the statutory obligation of the vessel owner or master by paying the repair duties or posting such bonds, just as there was no obligation of these defendants to act as local berth agents and file Customs Form 3171. It was only their agency relationship with the vessel owner that created the obligation to post a bond. It does not appear to be unusual for an agent of an owner or consignee of merchandise

in other situations to make an entry and pay or post a bond for the duties due. See 19 U.S.C. §§ 1484, 1485, 1505. The defendants, acting as agents, chose to act for their principal, the vessel owner, and were so viewed by the third party and obligee, the United States of America.

When it ultimately developed that the vessel owner was bankrupt and could not respond in the usual way to pay the liquidated duties for foreign ship repairs, the Government looked to alternative sources. Since the foreign repair duties, as in the case of other duties which the vessel owner and master were liable for, were encompassed within the broad language of these blanket bonds, the United States could reasonably rely on the vessel owner and, alternatively, on such bonds when releasing the vessel in accord with the dictates of the applicable statute and Treasury Regulations. This construction of the scope of the liability of the blanket bonds is viewed as being entirely consistent with the purpose of the tariff statute. See Caldwell Shipping Co. v. United States, 53 Cust. Ct. 311 (1964).[4] The fact that this precise situation involving a bankrupt vessel owner had not arisen previously according to the record in this case does not alter this Court's conclusion as to the applicable law when the situation does arise.

The Court can only conclude that this obligation, unusual though it may be, was within the authority of these agents and within the agency agreement with their principal, the owner of the SS SEA PIONEER, since no evidence to the contrary has been presented for this Court's consideration. The

scope of an agency relationship is determined by the agreement between the parties and the particular circumstances under consideration. 2 S. Williston, A Treatise on the Law of Contracts § 274 (3d Ed. 1959). Within the scope of this relationship the acts of the agent are those of the principal. This would include protests by an agent against an assessment for foreign repair duties. Yel Chong Lung & Co. v. United States, 11 Ct. Cust. App. 382 (1922). Clearly, the mere fact that an agency relationship exists does not preclude the imposition of personal liability on an express contract with a third party, even though the contract is primarily for the benefit of the principal. Dietrich v. United States Shipping Bd. Emergency Fleet Corp., 9 F.2d 733 (2d Cir. 1925); Restatement (Second) of Agency § 335 (1958).

Further, the defendants Collin & Gissel and Thibodeaux cannot assert that this risk was outside of their realm of knowledge and incapable of being reasonably ascertained. In view of the all inclusive language of their blanket bonds, the explicit language of the Treasury Regulations and the Caldwell decision, this potential liability could have been readily determined if the defendants had made inquiry. Similarly, the defendant surety companies as specialized business corporations are compensated to assume reasonable and ascertainable risks which are created by obligations that they insure in the normal course of their business. See 10 S. Williston, A Treatise on the Law of Contracts § 1213 (3d Ed. 1967).

There is no evidence in the record which reflects that the attempts by the Government to liquidate and collect the

tariff duties were not carried out with reasonable expediency. The delay appears to have been primarly attributable to the laxity of the vessel owner in complying with the Government's requests to liquidate the duties which were due. Defendants Gissel and Thibodeaux were not unaware of this situation. Eventually, the shipowner for unspecified reasons went bankrupt. Under the broad provisions of the blanket bonds, the local berth agents then became unconditionally liable for these duties. The sureties would not be discharged because of the inaction of a creditor to enforce the claim against the principal. See Restatement of Security § 130 (1941).

Accordingly, it is the decision of this Court that the Government is entitled to recover from defendants Collin & Gissel and C. J. Thiobodeaux & Company, as principals on the bonds, and defendants Globe Indemnity Co. and Travelers Indemnity Co., as sureties on the bonds, the total amount of the two $10,000 bonds in issue. The various stipulations of facts of the parties as supplemented herein from the submitted record, are adopted as the Court's Findings of Fact and the foregoing constitute the Court's Conclusions of Law.[5] Counsel will prepare and submit an appropriate judgment within twenty (20) days incorporating by reference such Findings of Fact and Conclusions of Law and properly assessing interest and costs. The clerk will notify counsel.

DONE at Houston, Texas, this 19th day of January, 1973.

(Signed)
CARL O. BUE, JR.
Carl O. Bue, Jr.
United States District Judge

[247]

(PRINTERS NOTE: The following are five footnotes to the Memorandum Opinion of the United States District Court)

---

1. As a result of the Tariff Act of 1971 this provision was recodified and is presently found in 19 U.S.C. § 1466.

---

2. This section provides, in part, that:

§ 4.14 Equipment and repairs to American vessels.

(a) The master's declaration on Customs Form 3415 required by § 4.7(d)(1), covering equipment, repair parts, or material acquired, or expense for repairs incurred, in a foreign country, within the purview of section 466, Tariff Act of 1930, as amended, shall be filed, whether or not the items, or any of them, may be exempt from entry as stated in paragraph (b)(1) of this section.

(b) Entry on customs Form 7535 shall be made for such equipment or repairs. Such entry shall show the last sailing date from each country at which repairs were made on the particular voyage. Estimated duties shall be deposited or a bond on customs Form 7567 or 7569 given therefor before the vessel shall be allowed clearance, except that—

(1) No entry or bond shall be required with respect to items which the collector is satisfied are clearly within the purview of R.S. 3115(3), as amended, and

(2) Vessels owned by the United States, although subject to the provisions of section 466, Tariff Act of 1930, as amended, shall be allowed to proceed without such deposit of duties or filing of a bond, if operated by the Maritime Administration or other agency of the United States or if operated under an agreement providing that such an agency shall pay duties accruing under section 466. Vessels owned by the United States and operated by private parties who are liable by agreement for duties accruing under section 466 shall be treated in all respects the same as privately-owned vessels.

(c) The master shall file with the entry receipts showing the costs of items enumerated in the said section 466. If, however,

it is impracticable to produce such receipts at the time of entry, liquidation of the entry shall be suspended pending the furnishing of a complete account of the items liable to duty. In such cases the collector shall cause an examination of such equipment or repairs to be made by a representative of the appraiser's office, if possible, in order to verify the cost declared on entry. If the cost of the equipment or repairs, as shown by the complete account when filed, differs from that declared on entry, the collector may permit the entry to be amended accordingly.

(d) When the entry has been completed by the filing of proper evidence of cost and no application for relief as provided for in paragraph (e) of this section, has been filed within the time authorized or, if filed, has been finally acted upon, or the collector is informed that no such application will be filed, the entry shall be liquidated.

(e) An application for relief may be filed with the District Director of Customs alleging that:

(1) An item covered by the entry is not within the class of items liable to duty under section 466(a) of the Tariff Act of 1930, as amended, or

(2) Such item is within the provisions of section 466(b) or 466(c) of the Tariff Act of 1930, as amended, or

(3) Both of the foregoing.

To insure consideration in liquidation of the entry, the application shall be filed within 90 days from the date of entry. Unless the district director is definitely advised that no application will be filed, the liquidation shall be suspended for 90 days to afford an opportunity for such filing. In meritorious cases and upon written request, the district director may authorize a further suspension of 90 days. Applications for relief submitted after those time periods shall not be considered without prior Bureau approval. Inasmuch as an unprotested liquidation insofar as it relates to the classification of items under section 466(a) of the

Tariff Act of 1930, as amended, is final at the expiration of 90 days, a subsequent application in regard to such classification cannot be considered in the absence of a timely protest.

. . . .

(j) The authority under section 3115 of the Revised Statutes, as amended, to remit or refund duties is delegated to the several collectors of customs and their successors in office. When the evidence referred to in paragraphs (f), (g), or (h) of this section has been received and examined by the collector of customs he shall notify the owner or operator of the vessel, or other party in interest, of his decision, but if any doubt exists the case shall first be referred to the Bureau for advice. Thirty days after the date of such notice the collector shall proceed to liquidate the entry unless within that period the owner or operator of the vessel, or other party in interest, shall file a petition as provided for in paragraph (k) of this section.

(k) The owner or operator of the vessel involved, or other party in interest, may filed with the collector of customs a petition addressed to the Commissioner of Customs for a review of the collector's decision on an application claiming relief under section 3115, Revised Statutes, as amended, (paragraph (e)(2) or (3) of this section). Such petition shall be filed in duplicate within 30 days from the date of the notice of the collector's decision, shall completely identify the case, and shall set forth in detail the exceptions to the collector's decision. When such a petition has been filed, the collector shall immediately transmit both copies thereof and the entire file to the Bureau, together with any comments he may desire to submit. When the Bureau's decision has been received the entry shall be liquidated in accordance therewith.

---

3. Section 4.16(b) provides that:

(b) If the application is approved, the collector of customs or such deputy collector of customs as may be designated by him shall receive the report of arrival and the entry of the vessel and grant it clearance on board the vessel.

Section 4.30 provides, in part, that:

§ 4.30 Permits and special licenses for unlading and lading.

(a) Except as prescribed in paragraph (f), (g), or (k) of this section or in § 123.8 of this chapter and except in the case of a vessel exempt from entry or clearance under 19 U.S.C. 288 no passengers, cargo, baggage, or other article shall be unladen from a vessel which arrives directly or indirectly from any port

or place outside the customs territory of the United States and no cargo, baggage, or other article shall be laden on a vessel destined to a port or place outside the customs territory of the United States, if customs supervision of such lading is required, until the collector shall have issued a permit or special license therefor on customs Form 3171.

(b) Application for such a permit or special license shall be made by the master, owner, or agent of the vessel on customs Form 3171, and shall indicate the type of operations desired. An agent of a vessel may limit his application to operations involved in the entry and unlading of the vessel or to operations involved in its lading and clearance.

(c) No unlading or lading requiring customs supervision shall be done at night or on a Sunday or holiday unless the application on customs Form 3171 is supplemented by a request of the master, owner, or agent of the vessel for overtime services of customs officers and the request is approved by the district director of customs. Such approval, together with the permit, shall constitute a special license. The request for overtime services of customs officers, shall be made on customs Form 3171. Such request for overtime services must specify the nature of the services desired and the exact times when they will be needed, unless arrangements are made locally so that the proper customs officer will be seasonably notified during official hours in advance of the rendering of the services as to the nature of the services desired and the exact times they will be needed. Such request shall not be approved unless the required cash deposit or bond on customs Form 7567 or 7569 shall have been received, except that, when a

carrier has on file a bond on customs Form 3587, no further bond shall be required solely by reason of the unlading or lading at night or on a Sunday or holiday of merchandise or baggage covered by bonded transportation entries. If a request for overtime services is limited as set forth in paragraph (b) of this section, appropriate words such as "to enter and unlade," or "to lade and clear," shall be used in the request. Separate bonds shall be required if overtime services are requested by different principals.

(d) Except as prescribed in paragraph (f) or (g) of this section, a separate application for a permit or special license shall be filed in the case of each arrival. The permit or special

license shall not become effective until the master shall have made preliminary or formal entry or, in the case of vessels not required to enter, the master shall have reported the arrival of the vessel.

. . . .

(i) The collector shall not issue a permit to unlade cargo or equipment of vessels arriving directly or indirectly from any port or place outside the customs territory of the United States, except on compliance with one or more of the following conditions:

(1) The merchandise shall have been duly entered and permits issued; or

(2) A vessel bond on customs Form 7567 or 7569 shall have been given; or

(3) The merchandise is to be discharged into the custody of the collector of customs as provided for in section 490 (b) Tariff Act of 1930.

---

4. In the Caldwell Shipping Co. decision the Court indicated that:

The statute does not require an agent to pay the duties on repairs; but if the owner or master employs an agent, and the agent does pay the duties, his action, like other actions of an agent, is the action of the principal if it is within the scope of the agent's authority. Yee Chong Lung & Co. et al v. United States, Ct. Cust. Appls.

382, T.D. 39191; Bemis Bro. Bag Co. v. United States, 59 Treas. Dec. 169, T.D. 44558.

Although the authority of the agent here has not been delineated precisely, and we lack proofs, to represent a ship's operator at the port of entry often involves the expenditure of money; therefore, a request on the part of the principal to incur expenditure may be inferred, together with an implied promise to repay. 3 Corpus Juris Secundum, Agency, section 197.

Under the circumstances, the Government would have a right to rely on plaintiff's implied or apparent authority to pay the duty assessed and which plaintiff did, in fact, pay. Plaintiff's grievance is against its principal, and it may not claim relief from a third party (the Government) because of the principal's failure to furnish information or to reimburse plaintiff for the amounts expended for the principal. 53 Cust. Ct. at 313-14.

---

5. Concurrent with submission defendants, C. J. Thibodeaux and Company, Globe Indemnity Company and The Travelers Indemnity Company, have filed a motion to strike certain deposition testimony and exhibits apparently offered by the Government as background information for the benefit of the Court. Inasmuch as the decision in this case does not rest on a consideration of the opinions expressed in such depositions, the motion is granted as to them; however, in view of certain of the stipulations of facts, the motion is denied as to the Government exhibits which have been considered and given such weight by the Court as they are entitled to receive in arriving at a decision in this case.

UNITED STATES of America, Plaintiff-Appellee,

v.

Leola Studdert GISSEL, Executrix of the Estate of Julius Schutze Gissel, et al., Defendants-Appellants.

UNITED STATES of America, Plaintiff-Appellee,

v.

C. J. THIBODEAUX AND COMPANY and the Travelers Indemnity Company, Defendants-Appellants.

No. 73-2829.

United States Court of Appeals, Fifth Circuit.

April 26, 1974.

Consolidated actions in which Government sought, under bonds filed by two local berthing agents, to recover foreign repairs customs duties assessed against vessel. The United States District Court for the Southern District of Texas, 353 F.Supp. 768, Carl O. Bue, Jr., J., found for the Government for the penal sum of each bond, and the local berthing agents appealed. The Court of Appeals, Aldrich, Senior Circuit Judge, held that the bonds encompassed the payment of foreign vessel repairs customs duties, that the berthing agents' later applications for permits to unlade the vessel requesting only certain services did not modify the bonds, which on their faces applied in toto to any vessel "entered and cleared" by the agents, that the agents were not entitled to claim that the Government's act of permitting the vessel to depart was an

unconsented to release of the security or extension of credit to the principal, which discharged the surety and that the bonds were not discharged because the Government should have proceeded with more dispatch against the vessel, which was sold in foreign ship mortgage foreclosure proceedings.

Affirmed.

* * *

Appeals from the United States District Court for the Southern District of Texas.

Before ALDRICH, Senior Circuit Judge,* and BELL and GEE, Circuit Judges.

ALDRICH, Senior Circuit Judge:

These are two consolidated actions arising out of the bankruptcy and the consequent failure of the owners of an American vessel, the S. S. SEA PIONEER, to pay customs duties imposed by virtue of 19 U.S.C. § 257[1] on entry following repairs made in a foreign country. Defendants Gissel and Thibodeaux,[2] are so-called berthing agents whose business it is to make arrangements for entry, docking, attendance of customs agents, etc. and clearance, on behalf of vessels entering United States ports where they offer their services. In connection therewith each defendant annually files a blanket bond specified to apply to all vessels entered and cleared by them in the

* Hon. Bailey Aldrich, Senior Circuit Judge of the First Circuit, sitting by designation.

1. Now 19 U.S.C. § 1466.

2. Strictly, Gissel, formerly d/b/a Collin & Gissel, is now deceased and is represented by his executrix, and Thibodeaux is C. J. Thibodeaux & Co. Also named defendants, but not embraced in that term as used herein, are two indemnity companies that signed Gissel's and Thibodeaux's bonds as sureties.

course of the year. The government is the obligee. In May 1964, the S. S. SEA PIONEER docked at Port Arthur, Texas, using Gissel's services. Having been repaired while abroad, she incurred a duty obligation finally liquidated in 1967 at $14,217. In October 1965, the vessel docked at Galveston, Texas, using Thibodeaux's services, and having again been repaired abroad, incurred a duty obligation finally liquidated in 1968 at $57,674. The owners having become bankrupt without having paid, and the vessel having been sold abroad without satisfying these claims, the government sued defendants on their bonds. The district court found for the government for the penal sum ($10,000) of each bond, and defendants appeal. In a nutshell, it is defendants' position that their bond covers only obligations for routine services rendered while the vessel was in port, and which they specifically requisitioned by executing Customs Form 3171, while the government claims that it covers the whole spectrum of the vessel's liability.

At least at first blush the government appears correct. The bonds, executed on Customs Form 7569, provided,

> "(1) If the above-bounden principal shall pay to the collector of customs of said port(s) promptly on demand such penalties as may be incurred by the vessels, vehicles, or aircraft, together with the sums chargeable under law and regulations for such services as may be performed for said vessels, vehicles, or aircraft by customs officers or employees, and *shall promptly pay any duties*, charges, exactions, penalties, or other sums found legally due the United States from any master or other proper officer or owner of said vessels, vehicles, or aircraft on account of said vessels, vehicles, or aircraft." (Emphasis suppl.)

Defendants contend, (a) that the bond does not in terms cover the duty imposed on account of foreign repairs; (b) that even if the form of the bond does in terms purport to cover such duties, in the context of its execution they were not covered when a berthling agent, rather than the vessel, was the party executing it; and (c) that in any event, although executing the bonds as principals, as between themselves and the vessel the agents were only sureties, and affording an extension to the vessel effected their discharge. Consideration of these defenses requires examination of the total circumstances.

[1] Pursuant to statutory authority, 19 U.S.C. §§ 1623, 1624, the Treasury Department adopted regulations under which an entering vessel itself, or by its agent, must apply for customhouse and attendant services and give bond for payment. It is further provided that if a vessel wishes to clear without payment of duty resulting from foreign repairs it must make a deposit or give bond for such. 19 C.F.R. § 4.14. Defendant's contention that the bonds which they signed did not in terms cover such duties, based on a construction they seek to give the prefatory "whereas" clauses, is not only unpersuasive in itself in view of the breadth of language, including the fact that there are four paragraphs in the bond referring to duties, but is firmly rebutted by the fact that the bond form which defendants signed, No. 7569, is particularly specified in 19 C.F.R. § 4.14 as suitable for covering the duty due on account of repairs. Defendants' point, accordingly, must be that for some reason, although they signed such a broad bond, the intent was for their liability to be limited to only some, and not this portion, of the bond's apparent undertakings.

[2-4] Nothing in the language of the bond suggests a limitation. Nor did defendants' later applications for per-

mits to unlade the S. S. SEA PIONEER requesting only certain services, modify the bonds, which on their face applied in toto to any vessel "entered and cleared" by defendants. It is true, as defendants assert, that there is no statutory liability imposed upon a berthing agent for customs duties. Correspondingly, the statute provides that for such services as, concededly, are normally ordered by an agent, a bond shall be given by the "master, owner, or agent of such vessel," 19 U.S.C. § 1451, whereas a duty bond is merely required to be "given," with no mention made of agents. 19 C.F.R. § 4.14. It does not follow, however, that if an agent voluntarily gives a bond which in terms covers obligations of his principal, it should be unenforcible.[3] We see no reason why an agent may not furnish credit as a service to his principal if he wishes to. *Cf.* Caldwell Shipping Co. v. United States, 53 Cust. Ct. 311 (1964) (payment of duty by agent).

[5, 6] It must equally follow that since the very purpose of furnishing a duty bond is to permit the vessel to clear without paying the duty, the agent cannot claim that permitting the vessel to depart was an unconsented-to release of the security, or extension of credit to the principal, which discharged the surety. Nor are we persuaded by the argument that the government should have proceeded with more dispatch against the vessel. It may be, as defendants suggest, that berthing agents were never charged for uncollectible duty before, but, as the district court held, this does not mean that the liability was not clearly undertaken. We find no ambiguity in the instrument itself, or in the surrounding circumstances.

Affirmed.

---

3. For doubtless good and sufficient reason, Gissel and Thibodeaux do not claim that, as they were agents of a disclosed principal (the vessel or its owners), under agency principles the principal was the party chargeable and they were not. We do not, accordingly, pursue this question.

Customs Form 7569
TREASURY DEPARTMENT
25.4, C. R
May 1957

No. _____

BUREAU OF CUSTOMS

VESSEL, VEHICLE, OR AIRCRAFT BOND (Term)

(To lade or unlade at night or on Sunday or a holiday, to land equipment for repairs, etc., to discharge on lighters or outside docks, to pay legal charges, penalties, etc., to land cargo in other districts or foreign ports, to secure the payment of overtime, and to produce documents.)

KNOW ALL MEN BY THESE PRESENTS That[1] _____,
of _____,
and[1] _____, of _____, as principal,
and _____, of _____,
as sureties, are held and firmly bound unto the UNITED STATES OF AMERICA in the sum of _____ dollars ($_____), for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

WITNESS our hands and seals this _____ day of _____, 19____.

WHEREAS, certain vehicles, vessels, or aircraft of the _____
(Line)
_____
_____
_____
are expected to arrive at the port(s) of[2] _____ during the period of one year from _____ to and including _____, 19____, to report, enter and clear, and to discharge and take on cargo and passengers pursuant to the provisions of the Tariff Act of 1930, as amended, the regulations issued pursuant thereto, and other acts and regulations relating to the entry and clearance of vessels, vehicles, and aircraft;

WHEREAS, the above-bounden principal has requested or will request the assignment of customs officers or employees to overtime duty at night or on Sunday or a holiday pursuant to the provisions of the Tariff Act of 1930, as amended, the Act of February 13, 1911, as amended, or any other act, or acts, and regulations relating thereto, in effect at the time of such duty, on behalf of vessels, vehicles, or aircraft;

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH That—

(1) If the above-bounden principal shall pay to the collector of customs of said port(s) promptly on demand such penalties as may be incurred by the vessels, vehicles, or aircraft, together with the sums chargeable under law and regulations for such services as may be performed for said vessels, vehicles, or aircraft by customs officers or employees, and shall promptly pay any duties, charges, exactions, penalties, or other sums found legally due the United States from any master or other proper officer or owner of said vessels, vehicles, or aircraft on account of said vessels, vehicles, or aircraft;

(2) And if the above-bounden principal shall exonerate and hold harmless the United States and its officers from or on account of any risk, loss, or expense of any kind or description which might occur or be occasioned by reason of the granting of any special license or permit to discharge or take on cargo, equipment, baggage, ballast, fuel, or other articles at night or on Sunday or a holiday, as well as from any loss or damage resulting from fraud or negligence on the part of any officer, agent, or other person employed by the above-bounden principal, by reason of the granting of any special license or permit;

(3) And if all fuel supplies, sea stores, vessel supplies, crew purchases, ships' stores, and equipment shall not be unladen from the vessels or aircraft of the above-bounden principal nor removed from the place of unlading except under customs supervision, and if any such merchandise so unladen and permitted to be removed from the place of unlading without entry therefor having been made is returned into customs custody and reladen, under customs supervision, on the vessels or aircraft from which unladen, or in the event of failure to comply with the foregoing provisions, the above-bounden principal shall pay the duties, taxes, charges, and exactions accruing on the merchandise with respect to which there has been a default (it being understood and agreed that the amount to be collected shall be based upon the quantity and value of such merchandise as determined by the collector of customs, and that the decision of the collector as to the status of such merchandise, whether free or dutiable, together with the rate and amount of duties, taxes, charges, and exactions, also shall be binding on all parties to this obligation);

[1] If the principal or surety is a corporation, the name of the State in which incorporated also shall be shown.
[2] When bond is used as blanket bond list on inside page ports to be covered.

Customs Form 3171
TREASURY DEPARTMENT
4.39, C. M.: 4.36, 4.38, 4.37, 4.39,
4.91, 24.15, C. R.
May 1957

APPLICATION AND PERMIT TO LADE OR UNLADE VESSELS OF 5 NET TONS OR MORE AND TO ALLOW UNENTERED CARGO TO REMAIN UPON WHARF BEYOND 5-DAY PERIOD

BUREAU OF CUSTOMS

Form approved.
Budget Bureau No. 48-R2414.

No. .....

DISTRICT NO. 22, PORT OF GALVESTON, TEXAS, OCTOBER 11, 1965 (Date)

To the COLLECTOR:

Application is hereby made for a permit, for some or all of the operations described below and for overtime services if indicated in item 9, in connection with the AMER. SS "SEA PIONEER" (Vessel) of the PIONEER TANKERS, INC. Line, to lade or unlade at or upon TODD GALVESTON DRYDOCK(FOR REPAIRS) (Wharf, lighter, etc. List in sequence, if more than one pier), arrived or expected to arrive from YOKOHAMA, JAPAN on [illegible] (Date):

APPLICANT TO CHECK APPLICABLE ITEMS, IF KNOWN

1. To unlade merchandise (intended to be unladen at this port, as shown by the manifest), baggage, or passengers.
2. To allow unentered cargo, viz: .....
   to remain upon wharf until ..... o'clock on the ..... day after the expiration of the 5-day period granted by statute for making entry.
3. To land "in bond" merchandise (Sec. 551, Tariff Act of 1930).
4. To land and release for repair, adjustment, or refilling and to relade under customs supervision articles of the vessel's equipment, such as: Laundry, machinery, radios, ship's chronometer, compass, sails, water casks, and other articles of a character generally used on ships. THE UNDERSIGNED CERTIFIES THAT THE ARTICLES LISTED ON THE REVERSE HEREOF FOR RELEASE UNDER THIS ITEM ARE TO BE LANDED ONLY FOR THE PURPOSE MENTIONED IN THIS ITEM AND WILL BE RELADEN ON THIS VESSEL. (Articles to be listed on reverse side hereof showing date and hour of unlading and relading.)
5. To land supplies, ship's stores, sea stores, or equipment not to be reladen, subject, however, to free or duty-paid entry (Sec. 446, Tariff Act of 1930).
6. To discharge ballast. (If the value exceeds $1, free or duty-paid, entry therefor is required.)
7. To lade merchandise or baggage requiring customs supervision.
8. To retain on board the cargo manifested for other ports, domestic or foreign.
9. Services of customs officers and employees during other than official hours on OCT. 12/16, 1965 (Date), at 5:00 P.M. M., for—
   - ☒ Entry, clearance, etc. ☐ Lading and unlading.
   - ☐ BONDED STORES, IF REQUIRED

   (If other services desired, state nature and place such services are to be performed. Request must specify nature of services and exact times required, unless arrangements are made to notify proper customs officer reasonably during official hours in advance of services as to nature thereof and exact times needed. If such arrangements are made, note "As per supplemental oral request" on above line.)
10. VESSEL WILL REQUIRE BOARDING
11. .....
12. .....

Principal on bond C. J. THIBODEAUX & COMPANY

Amount of bond, $10,000.00, dated MARCH 1ST, 1965

C. J. THIBODEAUX & COMPANY

[signature]

XXXXXXXXXXXXXXXX, Agent.

Address 421 COTTON EXCH. BLDG., HOUSTON, TEXAS

To the CUSTOMS OFFICER CONCERNED:

Application approved and permit (license) granted. Inspectors will make their return on the back of this form. This permission will not become available, however, until after the manifest of said vessel shall have been delivered to the proper customs officers, and all of the cargo, baggage, or other articles unladen shall be moved from the wharf, lighter, or other place of unlading before the issuance of a proper permit therefor, or, in the absence of a permit, at the expiration of the general order period.

Request for overtime services approved, subject (if indicated) to oral advice by applicant as to the nature of services desired and exact times needed. You will assign the required number of inspectors and other employees. If no action is taken on overtime request, note below.

..... (Date)

65

(Inspectors and other employees will note overtime services performed on Customs Form 3853-A.)

Deputy Collector.

Notice: When the lading or lading is made at more than one pier, the inspector at each pier will make a separate report on reverse side hereof. This permit must be delivered to the next pier by a customs messenger, or, if no messenger is available, it may be placed in a sealed envelope, addressed to the inspector at the next pier, and handed to the master for delivery.

Customs Form 7553
TREASURY DEPARTMENT
19 C.F.R. Part 10, Sec. 10.8
Jan. 1962

ENTRY OF EQUIPMENT AND/OR REPAIR PARTS OR REPAIRS MADE IN FOREIGN COUNTRIES UPON AMERICAN VESSELS

Sections 466 and 484, Tariff Act of 1930

Entry No. _____

Auditor's No. _____

UNITED STATES CUSTOMS SERVICE

District No. 22 Port of GALVESTON, TEXAS, Date filed OCT. 14., 19 65

I, the undersigned H. NICHOLAS CARRIOS, declare I am the master or owner of the T. A.O.S. 30 "SEA FALCON", a vessel documented under the laws of the United States, and that FALCON CARRIERS, INC. of 200 PARK AVE., NEW YORK, N.Y. are the owners and A. H. N. A. of WASHINGTON, D.C. are the charterers of said vessel, and I herewith report and declare that this entry, to the best of my knowledge and belief, contains a full and complete account, together with the cost, at the places and times mentioned below, of the following items, consisting of the equipment, or any part thereof, including the boats, purchased for, or the repair parts or materials to be used, or the expenses of the repairs made in a foreign country for said vessel now lying at TODD GALVESTON DRYDOCK, GALVESTON, which arrived on NOV. 12, 1965, 19 , being the first arrival since the purchases or repairs were made. I further declare that if at any time hereafter I discover any error in the account now produced or receive any information showing a different state of facts I will immediately make the same known to the Collector of this port. I hereby stipulate that the estimated duties will be deposited, or bond given therefor, before clearance is granted, except on vessels specially exempted by regulations of the Secretary of the Treasury, and that all increased duties that may accrue will be paid when ascertained.

PLACE AND DATE	DESCRIPTION OF REPAIRS AND PURCHASES	VALUE IN FOREIGN MONEY	ENTERED VALUE IN U. S. MONEY	RATE	DUTY	
					DOLLARS	CENTS
11/9/64 CURACAO, N.I.	ELECTRICAL REPAIRS	FL 83.00	48.00	50%	24	00
1/7/65 CURACAO, N.I.	VOYAGE REPAIRS	FL 959.00	512.00	50%	256	00
2/25/65 CURACAO, N.I.	VOYAGE REPAIRS	FL 3968.00	2122.00	50%	1061	00
3/20/65 YOKOHAMA, JAPAN	SUMI INDUSTRY CO., LTD RADIO & ENGR REPAIRS	YEN 36550.00	101.00	50%	50	50
4/65 JAPAN	HITACHI SHIP(SHIPBUILDING) CASUALTY & GENERAL REPAIRS	YEN 7,300,00.00	25,920.00	50%	12960	00
	THIS IS AN ESTIMATED PRELIMINARY ENTRY ONLY & CORRECT ENTRY WILL BE MADE BY OWNER, FALCON CARRIERS, INC., 200 PARK AVE., NEW YORK, N.Y., AS SOON AS ALL FINALIZED INVOICES ARE IN HAND.					

(Signature) _____ Owner or Master.

(Address) 1003 [illegible], GAL.

Declared to before me on OCT. 14, 19 65, at the Port of GALVESTON, TEXAS

Notary Public or Deputy Collector.

(Authority for administration by collectors of customs as prescribed by 25 C.F.R. 1.4. This form may be printed by private parties. Forms 7553 and 7553a are obtainable from the Government Printing Office in book form in sets, including carbon sheets and arrangement.)

EXHIBIT C

FILED
OCT 15 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-14

LEOLA STUDDERT GISSEL, Executrix of the Estate of JULIUS SCHUTZE GISSEL, and GLOBE INDEMNITY COMPANY,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

C. J. THIBODEAUX and COMPANY and THE TRAVELERS INDEMNITY COMPANY,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

(Consolidated Cases)

AMICUS CURIAE MOTION AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRANCIS J. O'BRIEN
Attorney for Amicus Curiae
Association of Ship's
Brokers and Agents
(U.S.A.) Inc.
96 Fulton Street
New York, New York 10038

ROBERT E. DALEY
HILL, RIVKINS, CAREY, LOESBERG
& O'BRIEN
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

LEOLA STUDDERT GISSEL, Executrix of the Estate of JULIUS SCHUTZE GISSEL, and GLOBE INDEMNITY COMPANY,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

C. J. THIBODEAUX and COMPANY and THE TRAVELERS INDEMNITY COMPANY,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

(Consolidated Cases)

Motion for Leave to File the Accompanying Brief as *Amicus Curiae* in Support of Petition for Writ of Certiorari in the United States Court of Appeals for the Fifth Circuit.

Statement of Interest of *Amicus Curiae*

Francis J. O'Brien of Hill, Rivkins, Carey, Loesberg & O'Brien, New York, New York, a member of the bar of this Court and the attorney for the Association of Ship's

Brokers and Agents (U.S.A.) Inc., respectfully moves this Court for leave to file the accompanying brief *"amicus curiae"*, in support of the writ of certiorari on behalf of the petitioners.

The defendant petitioners herein while acting as steamship agents of the vessel, "S.S. SEA PIONEER", have been held liable for the payment of duty on foreign repairs pursuant to *19 USCA § 257* (presently *19 USCA § 1466 (a)*) on bonds which were posted pursuant to *19 CFR § 4.30* in the amount as provided in *19 CFR § 25.4 (19)*.

The Association of Ship's Brokers and Agents (U.S.A.) Inc., is a corporation which is organized and existing under the laws of the United States, with an office and principal place of business situated at 17 Battery Place, New York, New York. Before the Association became incorporated in 1954 it limited its activities to the organization, regulation and representation of the ship brokers and steamship agents in the Port of New York. However, since that date the Association has become truly national in scope and has opened its roles to all qualified individuals, regardless of their company affiliation. The national effect of the Association is further evidenced by the fact that in August of 1969 the Association became a member of the International Federation of National Associations of Ship Brokers and Agents (F.O.N.A.S.B.A.), whose membership is made up of recognized National Associations of ship brokers and agents with only one such Association from each country. Therefore, it is clear that the Association of Ship's Brokers and Agents (U.S.A.) Inc. are not only involved with the interests of ship brokers and/or steamship agents in the United States but are also, through their participation in F.O.N.A.S.B.A., directly involved with the organization, regulation, and representation of ships brokers and/or steamship agents on an international scale.

In view of the foregoing, we respectfully submit that the accompanying brief will perhaps lay more pointed em-

phasis, than will the immediate parties to this petition, on the decisions made below on the liability of steamship agents for foreign repairs pursuant to *19 USCA § 257* (presently *19 USCA § 1466 (a)*).

For the foregoing reasons it is respectfully prayed that this Honorable Court accept the accompanying brief "*Amicus Curiae*".

Respectfully,

Francis J. O'Brien
of Hill, Rivkins, Carey,
Loesberg & O'Brien
96 Fulton Street
New York, New York 10038

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. .....

LEOLA STUDDERT GISSEL, Executrix of the Estate of
JULIUS SCHUTZE GISSEL, and
GLOBE INDEMNITY COMPANY,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

C. J. THIBODEAUX and COMPANY and
THE TRAVELERS INDEMNITY COMPANY,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

(Consolidated Cases)

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF SHIP'S BROKERS AND AGENTS (U.S.A.) INC.

Questions Presented

1. Whether the procedures and forms employed by the Bureau of Customs with regard to liability of a ship's agents blanket term bond (Customs Form 7569) filed pursuant to *19 C.F.R. § 4.30* in the amount as stated in *19 C.F.R. § 25.4*, comply with the language and intent of the statutes and are in accord with the legislative concept of foreign repair duties under *19 U.S.C.A. § 257*?

2. Whether the District Court and the Court of Appeals erred in holding that the language of the customs forms and regulations clearly and unequivocally made defendants liable on their bonds for duty on foreign vessel repairs pursuant to *19 U.S.C.A. § 257*?

Statement of the Case

The controlling facts in this case are not disputed. For the purpose of this brief we adopt petitioner's statement of facts set out in petitioner's application for the writ of certiorari.

ARGUMENT

The writ of certiorari should be granted.

Importance of Question Presented

In determining this petition, the Court need not review factual issues, as the operative facts are not in dispute. What is under review are the decisions of the United States District Court for the Southern District of Texas dated January 19, 1973 (353 F. Supp. 768) and the decision of the United States Court of Appeals for the Fifth Circuit dated April 26, 1974 wherein it was held and later affirmed that a steamship agent who files a blanket term bond, on Customs

Form 7569, is liable for the duty owing on foreign repairs pursuant to *19 U.S.C.A. § 257* (presently *19 U.S.C.A. § 1466 (a)*).

19 U.S.C.A. § 257 provides:

§ 257. Duty on equipments or repair parts for vessels

> "The equipments, or any part thereof, including boats, purchased for, or the repair parts or materials to be used, or the expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade, or a vessel intended to be employed in such trade, shall, on the first arrival of such vessel in any port of the United States, be liable to entry and the payment of an ad valorem duty of 50 per centum on the cost thereof in such foreign country; *and if the owner or master of such vessel shall wilfully and knowingly neglect or fail to report, make entry, and pay duties as herein required, such vessel, with her tackle, apparel, and furniture, shall be seized and forfeited.* For the purposes of this section, compensation paid to members of the regular crew of such vessel in connection with the installation of any such equipments or any part thereof, or the making of repairs, in a foreign country, shall not be included in the cost of such equipment or part thereof, or of such repairs. R.S. § 3114; Sept. 21, 1922, c. 356, Title IV, § 466, 42 Stat. 957; June 17, 1930, c. 497, Title IV, § 466, 46 Stat. 719."

Although *19 U.S.C.A. § 257 supra* appears to be complete on its face, i.e. it provides for the liability of the *owner and master* for payment of duty on foreign repairs and sets forth the remedy for failure to pay, it has been respondent's position, which has been upheld in the lower courts, that the steamship agent is liable for the payment of duty on a blanket term bond filed on Custom Form 7569 pursuant to *19 C.F.R. 4.14(b)*. In this regard it is

submitted that the position of the respondent's and the decisions of the lower courts are without merit, not only because of the established custom of the trade but also because the wording of the various statutes involved, i.e. *19 C.F.R. 4.14(b)* and *19 C.F.R. 4.30*, appear to support the contentions of the petitioners herein.

Both *19 C.F.R. 4.14(b)* and *19 C.F.R. § 4.30* provide for the filing of Customs Form 7569, however it cannot be too heavily stressed that the wording of both sections is of prime importance.

19 C.F.R. 4.14 (b) provides in part:

> "§ 4.14 Equipment and Repairs to American Vessels
>
> (b) Entry on customs Form 7535 shall be made for such equipment or repairs. Such entry shall show the last sailing date from each country at which repairs were made on the particular voyage. *Estimated duties shall be deposited or a bond on customs Form 7567 or 7569 given therefor before the vessel shall be allowed clearance, . . .*

19 C.F.R. 4.30 provides in part:

> Landing and Delivery of Cargo
>
> "4.30 Permits and Special Licenses for Unlading and Lading.
>
> (a) . . . no passengers, cargo, baggage, or other article shall be unladen from a vessel which arrives directly or indirectly from any port or place outside the Customs territory of the United States . . . until the district director shall have issued a permit or special license on Customs Form 3171.
>
> . . . . . .
>
> (b) The request for a permit or a special license shall not be approved . . . unless . . . the required cash deposit or bond, on Customs Form 7567 or 7569, has been received."

In the case at bar the petitioners filed the required bond pursuant to *19 C.F.R. § 4.30 (c) supra* on January 14, 1965 (See Petitioners Exhibit A p. 61) before the cargo arrived in the United States, and on October 11, 1965 filed the required Customs Form 3171, as required by *19 C.F.R. § 4.30 supra*, so that the cargo aboard the S.S. SEA PIONEER could be unloaded upon arrival at a U.S. port (see petitioners Exhibit B p. 62). Subsequently, on October 14, 1965 the Master, pursuant to *19 C.F.R. § 4.14 (b)*, filed Customs Form 7535 which estimated the duties owed by the S.S. SEA PIONEER for foreign repairs (see petitioners Exhibit C p. 63) however no additional bond or cash deposit was made before the vessel was allowed clearance. It is the respondent's contention, which was upheld by the lower courts, that since the bond which was required by both *19 C.F.R. § 4.14 (b) supra* and *19 C.F.R. § 4.30 supra* was on Custom Form 7569 that the steamship agent is liable under both sections for money's due the United States. In our opinion, such an interpretation of *19 C.F.R. § 4.14 (b) supra* and *19 C.F.R. § 4.30 supra* is unwarranted and completely disregards the express language of both sections.

While it is true that both *19 C.F.R. § 4.14 (b)* and *§ 4.30 supra* require either a cash deposit or the posting of a blanket term bonds on Customs Form 7569, it is clear that the provisions of *19 C.F.R. § 4.30 supra* require the posting of a bond on Customs Form 7569 *before* a permit or special license under Customs Form 3171 will issue while the provisions of *19 C.F.R. § 4.14 (b) supra* clearly implies that there is an entry on Customs Form 7535 *and then* the estimated duties are deposited or bond posted *before the vessel shall be allowed clearance.*

Since the blanket term bond on Customs Form 7569 was posted, by the petitioners herein, almost ten months before the filing of the estimated duty for foreign repairs on Customs Form 7535 and further since the language of *19*

C.F.R. § 4.14(b) supra clearly implies that the posting of the bond on Customs Form 7569 shall be after the amount of duty on foreign repairs is estimated, it seems apparent that the blanket term bonds on Customs Form 7569 was filed not pursuant to the requirements of *19 C.F.R. § 4.14(b) supra* but rather in accordance with the requirements of *19 C.F.R. § 4.30 supra.*

Another factor which supports the position of the petitioners herein is that the Master of the S.S. SEA PIONEER in complying with *19 C.F.R. § 4.14(b)* estimated the amount of duty on Customs Form 7535 to be $14,351.50, however instead of requiring a bond for the full amount Customs allowed the steamship agents to post a bond on Customs Form 7569 for only $10,000.00. This fact would further tend to support the contentions of the petitioners herein that their liability is limited to the provisions of *19 C.F.R. § 4.30,* which by its terms deals only with the duty on cargo loaded and/or discharged and has no application to duties on repairs to American vessels in foreign yards.

Conclusion

It is submitted that the decision of the District Court for the Southern District of Texas dated January 19, 1973 (353 F. Supp. 768) and the decision of the Fifth Circuit dated April 26, 1974 were rendered without regard to the express provisions of *19 C.F.R. § 4.30* and *19 C.F.R. § 4.14 (b).* Both statutes require the posting of a bond on Customs Form 7569, however the purpose and objective of each statute is unrelated and distinct i.e. *19 C.F.R. § 4.30* concerns itself with duties on cargoes and *19 C.F.R. § 4.14 (b)* deals with duties owing the United States for repairs made on American vessels in foreign yards. Since the bond in the case at bar was posted pursuant to *19 C.F.R. § 4.30* to cover duties on cargoes loaded and/or unloaded in the United States, it would be inequitable to impose

further obligations on a party pursuant to another provision (*19 C.F.R. § 4.14 (b)*) of which the party had no notice and did not assume any obligation.

In view of the far reaching effect of this matter upon the numerous steamship agents in the United States, it is respectfully submitted that this matter is ripe for determination by this Court.

Dated: New York, New York, this 11th day of October, 1974.

Respectfully submitted,

By: FRANCIS J. O'BRIEN

Attorney for Amicus Curiae
Association of Ship's Brokers
and Agents (U.S.A.) Inc.

ROBERT E. DALEY
HILL, RIVKINS, CAREY, LOESBERG
& O'BRIEN
Of Counsel

Certificate of Service.

This is to certify that on the 11th day of October, 1974 copies of the above Application to Appear as Amicus Curiae and Brief in support thereof have been forwarded to:

Robert M. Julian, Attorney for Petitioners, C. J. Thibodeaux and Company, and Travelers Indemnity Company, whose consent to file this application has been obtained at his office and post office address, 1314 Texas Avenue, Houston, Texas 77002.

Alan S. Dale, Attorney for Petitioners, Leola Studdert Gissel, Executrix of the Estate of Julius Schutze Gissel, and Globe Indemnity Company, whose consent to file this application has been obtained at his office and post office address, Mellie Esperson Building, Houston, Texas 77002.

Mr. Lawrence L. Ledebur, Attorney for Respondent, United States of America, whose consent has not been obtained, at his office and post office address, Admiralty and Shipping Section, Department of Justice, Washington, D. C. 20530.

Mr. Jack Shepherd, Attorney for Respondent, United States of America, whose consent has not been obtained, at his office and post office address, Assistant United States Attorney, P. O. Box 61129, Houston, Texas 77061.

FRANCIS J. O'BRIEN

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-14

LEOLA STUDDERT GISSEL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend they are not liable for customs duty on foreign vessel repairs under blanket bonds whereby they undertook to pay all charges in connection with the berthing of a vessel that were not paid otherwise.

These consolidated cases were brought in the district court by the United States to recover from the principals and/or sureties of two $10,000 blanket term bonds on the SS SEA PIONEER for entries into Port Arthur, Texas, in 1964, and Galveston, Texas, in 1965. The SEA PIONEER's owners did not pay applicable customs duties and subsequently became insolvent (Pet. 4-5). The bonds provided that the principals "shall promptly pay any duties, charges, exactions, penalties, or other sums found legally due the United States from any master or other proper officer or owner of said vessels * * * on account of said vessels * * *." The United States asserted that the clear language of the bonds

expressly and unequivocally guaranteed prompt payment of custom duties assessed against the vessel pursuant to 19 U.S.C. (1964 ed.) 257[1] as a result of foreign vessel repairs.

The district court found that the language of the bonds must be given its plain meaning, and the defendants were thus liable for duties on vessel repairs done in a foreign port:

> Defendants Collin & Gissel and Thibodeaux were acting as local berth agents, and in that capacity they undertook to post and posted blanket bonds which literally recite and provide for the assumption of all duties or penalties legally due the Government from any master or vessel owner which the agent has undertaken to represent at the port. * * * To construe the language of the blanket bonds so as to include foreign repair duties merely requires the implementation of its plain meaning [Pet. App. 44-45].

The district court further found "this construction of the scope of the liability of the blanket bonds is viewed as being entirely consistent with the purpose of the tariff statute" (Pet. App. 47). The court of appeals affirmed, stating that:

> Defendants' contention that the bonds which they signed did not in terms cover such duties, based on a construction they seek to give the prefatory "whereas" clauses, is not only unpersuasive in itself in view of the breadth of language, including the fact that there are four paragraphs in the bond referring to duties, but is firmly rebutted by the fact that the bond form which defendants signed, No. 7569, is particularly specified in 19 C.F.R. §4.14 as suitable for covering the duty due on account of repairs [Pet. App. 59].

---

[1]This provision was recodified and is presently found in 19 U.S.C. 1466.

Petitioners primarily contend that the bonds were not authorized by the applicable statutory and regulatory scheme. In addition, they maintain that Congress intended that foreign repair duties "be treated as individual cases" and that "bonds be issued to fit the particular situation" (Pet. 11). However, 19 U.S.C. (1964 ed.) 257 (recodified in 19 U.S.C. 1466) expressly requires the prompt payment of foreign repair duties at an American vessel's first American port of entry. (See Pet. App. 36-37.) And 19 U.S.C. 1623 provides:

> (a) In any case in which bond or other security is not specifically required by law, the Secretary of the Treasury may by regulation or specific instruction require, or authorize collectors of customs to require, such bonds or other security as he, or they, may deem necessary for the protection of the revenue or to assure compliance with any provision of the law, regulation, or instruction which the Secretary of the Treasury or the Customs Service may be authorized to enforce.

Moreover, blanket term bonds are expressly authorized by 19 U.S.C. 1623(b)(3).[2] It is thus clear that the bonds in question were authorized. In any event, the question of statutory authorization is irrelevent to petitioners' liability. Certainly the bonds were not prohibited, and petitioners' liability is premised upon their voluntary undertaking which expressly guaranteed payment. (See Pet. App. 59-60.)

Finally, petitioners claim that they should be relieved from liability because the government failed to collect the duty immediately from the vessel's master rather than relying on the berthing agent's bond after the bankruptcy of the vessel's owner (Pet. 20, 25).

---

[2]See also 19 C.F.R. 25.4.

It must again be noted that the lower courts held that petitioners voluntarily bound themselves by filing the pertinent bonds. Their liability was not statutorily imposed. Further, as stated by the court of appeals (Pet. App. 60):

> * * * since the very purpose of furnishing a duty bond is to permit the vessel to clear without paying the duty, the agent cannot claim that permitting the vessel to depart was an unconsented-to release of the security, or extension of credit to the principal, which discharged the surety. Nor are we persuaded by the argument that the government should have proceeded with more dispatch against the vessel. It may be, as defendants suggest, that berthing agents were never charged for uncollectible duty before, but, as the district court held, this does not mean that the liability was not clearly undertaken.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

DOJ-1974-10